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No. 1592

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

B. B. WOODSON, TRUSTEE IN BANKRUPTCY FOR STERLING R. DECKER AND MARY JANE DECKER, PARTNERS, t/a BERKELEY COMMUNITY BUILDERS,

Petitioner

vs.

GEORGE GILMER

Respondent

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
for the Fourth Circuit

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Petitioner

vs.

GEORGE GILMER,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

B. B. Woodson, Trustee in Bankruptcy, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on January 30, 1970.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 420 F.2d 378, and is printed in Appendix A hereto, *infra,* page 41. This is a brief, *per curiam* decision, affirming on the statement of the District Judge (printed in Appendix C hereto, *infra,* page 45) and based on his comprehension of the earlier as well as the new issues in this case. The records of this case were voluminous, and certain of the

complex procedural aspects involved are printed in Appendix L hereto, *infra*, page 186. A requested opportunity for oral argument before the District Court was denied.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 30, 1970, (infra, Appendix A, page 41). Rehearing was denied on February 19, 1970, (infra, Appendix B, page 44). The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1). Order Staying Mandate issued March 2, 1970, granting a stay pending this application, provided the application is filed within the time prescribed by law.

QUESTIONS PRESENTED

I

IS IT ERROR TO HOLD THAT A $260,000 BLANKET DEED OF TRUST EXECUTED BY A CLIENT IS NOT VOID UNDER VIRGINIA LAW AS AN ABUSE OF THE ATTORNEY-CLIENT RELATIONSHIP WHERE THE ATTORNEY TRANSFEREE THEREBY RECEIVED FULL SECURITY FOR AN ANTECEDENT DEBT AND THE CLIENT WOULD NOT HAVE SIGNED THE DEED BUT FOR THIS RELATIONSHIP?

II

IS IT ERROR TO HOLD THAT A $260,000 BLANKET DEED OF TRUST EXECUTED BY A CLIENT IS NOT VOID UNDER THE BANKRUPTCY ACT AS A FRAUDULENT TRANSFER WHERE THE ATTORNEY TRANSFEREE THEREBY RECEIVES FULL SECURITY FOR AN ANTECEDENT DEBT TO THE DETRIMENT OF ALL OTHER CREDITORS OF THE INSOLVENT TRANSFEROR?

III

IS IT ERROR TO HOLD THAT WHERE AN INSOLVENT PARTNER IN A SOLVENT PARTNERSHIP ASSIGNS ALL OF HIS INTEREST IN A SPECIFIC TRACT OF LAND, PART OF WHICH WAS PARTNERSHIP PROPERTY, AS SECURITY FOR AN ANTECEDENT PERSONAL DEBT, IT SERVES TO TRANSFER HIS RIGHTS TO THE PROFITS AND SURPLUS OF THE PARTNERSHIP?

IV

IS IT ERROR TO HOLD THAT TWO SUPPLEMENTAL DEEDS OF TRUST EXECUTED BY AN INSOLVENT ON $40,500 WORTH OF REAL PROPERTY ARE NOT VOID UNDER THE BANKRUPTCY ACT AS FRAUDULENT TRANSFERS WHEN GIVEN AS ADDITIONAL SECURITY FOR AN ANTECEDENT DEBT OF $249,000 ALREADY FULLY SECURED BY A BLANKET DEED OF TRUST ON REAL PROPERTY VALUED AT OVER $300,000?

STATUTES INVOLVED

Bankruptcy Act (11 U.S.C. § 96)

Section 60. Preferred Creditors.

a.(1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

(2) For the purposes of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not so perfected against a bona fide purchase, or if any transfer of other property is not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of the petition.

* * * * *

Bankruptcy Act (11 U.S.C. § 107)

Section 67. Liens and Fraudulent Transfers.

d.(1)(e) Consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained.

* * * * *

d.(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent

(a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consid-

eration by a debtor who is or will be thereby rendered insolvent without regard to his actual intent; or

(b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; or

(c) as to then existing and future creditors, if made or incurred without fair consideration by a debtor who intends to incur or believes that he will incur debts beyond his ability to pay as they mature; or

(d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors.

* * * * *

Bankruptcy Act (11 U.S.C. § 110)

Section 70. Title to Property.

e.(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.

VIRGINIA CODE ANNOTATED (1950)

§ 50-25. Nature of right in specific partnership property.

(2) The incidents of his tenancy are such that: (b) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

§ 55-80. Void fraudulent acts; bona fide purchasers not affected.

Every gift, conveyance, assignment or transfer of, or charge upon any estate, real or personal, every suit commenced or decree, judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor.

STATEMENT OF FACTS

In April of 1957, Dr. Sterling R. Decker entered into a partnership agreement with George Gilmer, Sr., George Gilmer, Jr., David M. Wood, Jr., and Joseph M. Wood, II, concerning a tract of 110.68 acres of land in Albemarle County, Virginia. By this agreement Decker held an undivided one-half interest in the partnership. It also gave a one-third interest to the two Gilmers, a one-sixth interest to the two Woods, and provided that Decker would manage the development of the subdivision, which was to be known as "Berkeley". Decker was given the option to purchase the one-half interest of his partners in individual lots at a price of $1,000 per lot for the first fifty-three lots, and $1,250 per lot for all additional lots, provided that he purchase at least three lots per month, beginning in 1958.

Decker began the development of the Berkeley subdivision in another partnership with his wife, trading under the name of Berkeley Community Builders. Large amounts of capital were required for this operation, and

arrangements were made with Mr. Adams, an officer of The Peoples National Bank (now Virginia National Bank), to obtain the needed funds upon the personal credit and endorsement of his friend and attorney, George Gilmer, Sr., a man of considerable means whose credit was substantially unlimited. This was not an entirely new arrangement. Since 1954, Decker had been discounting notes at The Peoples National Bank, which notes had been personally endorsed by his attorney, Gilmer, for a fee, usually a percentage of the face amount of the note. Although Decker's checking account was frequently overdrawn, neither the bank nor Gilmer requested any security, and the Bank was perfectly content to lend money to Decker on Gilmer's endorsement.

In early 1961, Gilmer and Adams became more acutely aware that Decker's financial affairs were unsatisfactory. Decker had been diverting funds, borrowed for the Berkeley project, to other business ventures which had attracted his interest. Several of Decker's creditors were pressing him for payment, and on numerous occasions his checking account was again overdrawn. Since Gilmer had played an increasingly larger role as Decker's financier, he became greatly concerned about this situation, and commenced a two-month series of daily consultations with Adams relative to Decker's financial situation. By this time the bank was holding promissory notes made by Decker and endorsed by Gilmer totaling about $249,000, on which Gilmer was receiving an endorsement fee of 6% per annum, in addition to the interest payable to the bank on the face of the note. As the endorser, Gilmer would have been liable on these notes in the event of default by Decker.

The plan agreed upon by Gilmer and Adams was to put a blanket deed of trust on all of Decker's real estate to secure the indebtedness endorsed by Gilmer. In March

of 1961, Gilmer called Decker into his office and showed Decker a list of properties which he (Gilmer) had already drawn up.

On March 27, 1961, Decker and his wife executed a deed of trust covering all of their known real estate, together with a bond payable to bearer, on demand, in the amount of $260,000, with interest at 6%, secured by the deed of trust. (It was subsequently held that, as of this date, Decker was insolvent). This deed of trust was prepared by Gilmer, for which Decker was charged a fee of $100.00. Decker later testified that he would probably not have agreed to the deed of trust were it not for his close relationship with Gilmer, and that Gilmer, as his friend and attorney, could be trusted to look after his (Decker's) interests.

This bond and deed of trust were held by the bank as collateral security for the promissory notes which Gilmer had endorsed. At the same time, an "escrow" account, under Gilmer's sole control, and a "reserve" account, under the joint control of Gilmer and the bank, were set up to handle all funds connected with the Berkeley subdivision. All proceeds from the sale of lots by Decker were deposited in the "reserve" account, and disbursements from this account would be made by the bank only as directed by Gilmer. Purchasers of these lots would arrange with Decker for construction of their houses, and the bank would make "construction" loans to the lot purchasers for this purpose. All such funds were deposited in the "escrow" account, disbursements from which could be made only by Gilmer. Under this plan, Decker's only source of personal income was restricted to such amounts as Gilmer directed the bank to release from the "reserve" account.

During the spring and summer of 1961, the usual time of the year in which lot sales take place, approximately thirty lots were sold by Decker, and construction of

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houses on several of these lots was undertaken. Between June and October of 1961, about $76,000 from the sale of these lots was deposited in the "reserve" account. During the same period, at Gilmer's direction, a like amount was disbursed by the bank from this account. About $20,000 of this went to reducing Decker's indebtedness to the bank. About $40,000 went to pay some of Decker's creditors, of which amount some $30,000 was to creditors who held deeds of trust on Decker's properties which were prior and superior to the Blanket Deed of Trust securing Gilmer's interests. The remaining $16,000 went to pay for the purchase of Gilmer's and the other partners' interest in additional lots.

Even though Decker was reluctant to continue purchasing additional one-half interests in lots in excess of what he could sell currently, since this would tie up desperately needed capital, Gilmer insisted that he continue buying lots under the option. On June 3, 1961, fifteen additional lots were purchased, upon which lots a Supplemental Deed of Trust was then given as further protection for Gilmer. On July 26, 1961, eleven additional lots were purchased, upon which another Supplemental Deed of Trust was then given as further protection for Gilmer. On August 10, 1961, twelve additional lots were purchased, upon which another Supplemental Deed of Trust was given as further protection for Gilmer. On October 20, 1961, nine additional lots were purchased, upon which still another Supplemental Deed of Trust was given as further protection for Gilmer. These latter two deeds of trust were subsequently held to be void as preferential transfers and were set aside under §60a(1) of the Bankruptcy Act.

In all, the outstanding half interests of the Woods and Gilmers were thus purchased on a total of forty-seven additional lots, of which actual cash in the sum of $39,375

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(including the $16,000 from the "reserve" account mentioned above) was paid, the balance remaining unpaid. During this same period, proceeds from construction contracts were deposited in the "escrow" account, under Gilmer's exclusive control, and the surplus after payment of construction costs went, at least in the major part, to Gilmer for legal services and other charges. During this same period, Gilmer not only provided Decker with all of his casualty insurance coverage, but he also acted as attorney for both Decker and the buyer in all but about two sales of lots. In addition, he sold insurance coverage to some 80% of Berkeley homeowners.

As a result of these transactions, Gilmer had received blanket deeds of trust covering virtually all of Decker's property, had converted fractional interests to whole interests in forty-seven lots of his security, was collecting his endorsement fee on notes now fully secured (in addition to the interest being charged by the bank), and had a tight security interest in both bank accounts. When other creditors, including the Internal Revenue Service, demanded payment and threatened legal action, it was pointed out to them that Decker was now "judgment proof". By the late fall of 1961, Decker's financial status was beyond hope of recovery without outside help. Decker decided to get disinterested legal advice, in an effort to set up a court-supervised receivership to replace the Gilmer-supervised unofficial receivership. This was contested vigorously by Gilmer. On December 11, 1961, Gilmer prepared and signed a petition for the involuntary adjudication of Decker and the Berkeley Community Builders partnership as bankrupts.

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REASONS FOR GRANTING THIS WRIT

I

The instant decision of the Court of Appeals for the Fourth Circuit is in direct conflict with the law of the Commonwealth of Virginia relative to the abuse of the attorney-client relationship, wherein the attorney takes advantage of the trust and confidence which his client has in him to secure for his own benefit a distinct financial advantage.

The District Court found that the transaction was perfectly fair, that it was entered into by the client freely, that it was entered into with such a full understanding of the nature and extent of his rights as to enable the client to thoroughly comprehend the scope and effect of it, and *held* that "While Gilmer's influence was a factor in Decker's agreeing to the deed of trust, it cannot be concluded from the evidence that Gilmer's influence was *undue.*" The Opinion of the District Court was affirmed by the Circuit Court of Appeals in a *per curiam* opinion. This is in direct conflict with the law of the Commonwealth of Virginia that a *presumption* of fraud is present in every transaction arising from the attorney-client relationship and that the burden is clearly upon the attorney to overcome this presumption by clear and satisfactory evidence. This is an important question of state law.

II

The instant decision of the Court of Appeals for the Fourth Circuit is in direct conflict with the law of the Commonwealth of Virginia which holds that the presence of several of the Badges of Fraud shifts the burden of proof to the one who seeks to uphold the transfer to prove an absence of fraud.

The District Court found that several of the Badges

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of Fraud existed but *held* that "the trustee's burden of proof has not been met . . ." This holding was affirmed by the Circuit Court of Appeals in a *per curiam* opinion. This is an important question of state law.

III

The instant decision of the Court of Appeals for the Fourth Circuit is in conflict with the law of the Commonwealth of Virginia which holds that where doubt exists as to the meaning of a particular document, such doubt will be resolved *against* the drafter of the document.

Although Gilmer, the attorney, drafted the document which Decker and his wife signed, the District Court found that *Decker* intended to convey his partnership interest and *held* that "Decker himself would not be permitted to repudiate this solemn instrument, and the trustee, standing in his shoes, is in no better position." The Opinion of the District Court was affirmed by the Circuit Court of Appeals in a *per curiam* opinion. This is in direct conflict with the law of the Commonwealth of Virginia and is an important question of state law.

IV

The instant decision of the Court of Appeals for the Fourth Circuit is on an important question of federal law which has not been, but should be, decided by this Court.

The District Court reversed the referee's conclusions of law and *held* that §67d(2)(a) of the Bankruptcy Act permits not only the transfer of property as security for an antecedent debt (provided the antecedent debt is not disproportionally small as compared to the value of the security given), but also permits the transfer of property as *additional* security, without further consideration, for a *fully secured* antecedent debt, provided the antecedent

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debt is not disproportionally small as compared to the *aggregate* value of *all* security given. The Opinion of the District Court was affirmed by the Circuit Court of Appeals in a *per curiam* opinion. This is an important question of the federal law regarding bankruptcy and has not been, but should be, decided by this Court.

SUPPORTING ARGUMENT

I

THE COURT OF APPEALS ERRED IN NOT HOLDING THAT GILMER FAILED TO OVERCOME THE PRESUMPTION OF FRAUD WHICH EXISTS UNDER VIRGINIA LAW WHENEVER AN ATTORNEY DEALS WITH HIS CLIENT TO HIS OWN BENEFIT AND THAT THE $260,000 BLANKET DEED OF TRUST IS VOID AS AN ABUSE OF THE ATTORNEY-CLIENT RELATIONSHIP.

The majority of jurisdictions hold that all transactions and dealings between an attorney and his client are, as against the attorney, *prima facie* fraudulent, and that to uphold such a transaction the attorney must show, by clear and convincing evidence, not only that there was sufficient consideration moving to the client, but also that the client had all the information and advice that it would have been the duty of the attorney to give had he not been interested. 7 CJS *Attorney and Client* Section 127 at 965.

Virginia, more than any other state, regards the relationship of attorney and client as one involving the highest form of trust and confidence, and it is well settled in Virginia that all dealings between an attorney and his client, for the former's benefit, are *presumptively* fraudu-

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lent and invalid. *Thomas v. Turner's Adm'r,* 87 Va. 1, 12 S.E. 149 (1890); *Bruce's Ex'x v. Bibb's Ex'x,* 129 Va. 45, 105 S.E. 570 (1921); *Stiers v. Hall,* 170 Va. 569, 197 S.E. 450 (1938); *Nicholson v. Shockey,* 192 Va. 270, 64 S.E.2d 813 (1951). This presumption will stand until the attorney effectively rebuts it. The burden of proof which is on the attorney can be fulfilled only by clear and convincing evidence and requires, unlike the usual civil case, something more than a mere preponderance of the evidence. *Nicholson, supra.* The Virginia rule requires the *attorney* to prove 1) that the transaction was perfectly fair, 2) that it was entered into by the client with such a full understanding of the nature and extent of his rights as to enable him to thoroughly comprehend the scope and effect of the transaction, and 3) the client must have entered the transaction freely, and without *undue influence. Thomas, supra,* 12 S.E. at 153.

Although Virginia follows the majority in construing the "fairness" of a transaction, they adopt a much stricter approach on the other two elements. In *Thomas, supra,* at 155, the court set forth the test for the degree of knowledge which the client must possess before the *presumption* of fraud can be rebutted:

> *"it matters not that the evidence shows in a general way, that the contract was read and explained to the appellant, and that she expressed herself as satisfied* . . . . To support the transaction it was for the appellee to show that the instrument was the result of a *well considered, definite* and *settled* purpose on her part." (Emphasis added.)

As to the third element which the attorney must prove, namely, whether the client entered the transaction freely,

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the *Thomas* Court also stated that the attorney must show that the

> "instrument was executed without a speck of imposition or undue influence . . . and by undue influence in this connection *is not meant an actual influence consciously and designedly exerted, but the influence which naturally springs from a confidential relation.*" (Emphasis added.) at page 155.

Since the client, in *Thomas,* was illiterate, appellee has urged below that its rule should be limited to similar facts. But such is not the law of Virginia. In *Bruce, supra,* 31 years later, the Supreme Court of Appeals applied the same rule in a case involving a client characterized by the Court as

> "intelligent . . . in full possession of all his faculties, perfectly familiar with proceedings in court because of his years of experience as a litigant, jealous of his legal rights, energetic, thrifty, and fully able to take care of himself in a bargain." 105 S.E. at 572.

The plaintiff in *Stiers v. Hall, supra,* contended that the rules set forth in *Thomas* were softened by the statement in the *Bruce* decision to the effect that "while some cases have held that all such transactions are voidable at the election of the client, the better rule and the one established by the preponderance of authority does not go so far." This contention was rejected by the court on the grounds that the *Bruce* decision did not question "the rule as to the burden of proof theretofore adopted by this court." It should be noted that the court in *Bruce* did not hold the compensation contract voidable on the grounds of constructive fraud, but because the fees were excessive;

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thus any contentions that inroads were made by that decision on the *Turner* doctrine would be based on dicta, since it was not relevant to the foundation upon which the court rested its precise holding.

Therefore, it is clear that, under Virginia law, the presumption of fraud is present in every transaction arising from the attorney-client relationship. It is equally clear that the burden of proof on the *attorney* is not lessened or mitigated by the fact that the client is highly intelligent, shrewd, or even has considerable financial acumen.

These seemingly harsh rules are founded in public policy, operating independently of actual fraud, and without regard to the client's age, ability, or capacity. They are intended as a protection against the strong influence which naturally springs from a confidential relation.

The transactions in the present case must be tested by these same well-established legal doctrines set forth above. There is no question but that Gilmer was the actual intended beneficiary of the March 27, 1961, Blanket Deed of Trust. Gilmer was the one who worked closely with Decker, not the bank. As such, Gilmer was in a position to have a better knowledge of Decker's financial situation and the problems with creditors than the bank would have had. Furthermore, Gilmer was the only one who needed the Deed of Trust as security. Since the bank had Gilmer as an endorser on Decker's notes, it was secured in fact, if not in law. As the Court pointed out in *Gilmer v. Woodson*, 332 F.2d 541, 543 (4th Cir. 1964), Gilmer was a man of "considerable means whose credit appeared to be substantially unlimited," and the bank knew with almost absolute certainty that, if Decker defaulted, it could collect from Gilmer. Certainly the bank would not have objected to the additional security afforded by the Deed of Trust, but it was not imperative or even necessary for *its* purposes as long as Gilmer was the endorser. The only

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one who desperately needed to have the debt secured was Gilmer, so that he could protect himself.

Moreover, there is ample testimony that, if it had not been for Gilmer, Decker would have refused to execute the Blanket Deed of Trust for the bank. Indeed, Decker thought it was highly unfair of the bank to require both an endorsement and the Deed of Trust. Decker testified that he would not have executed the Deed of Trust "but for" his relationship with Gilmer. Moreover, Decker freely admitted that he intended the Blanket Deed of Trust as security for Gilmer: "Well, my intention was to give Mr. Gilmer security. I thought he was entitled to it." The whole transaction was perfectly consistent with Decker's prior revelation that anything he could do to help Gilmer, he did.

As the actual and intended beneficiary of the Blanket Deed of Trust, Gilmer has the *burden* under Virginia law of offering clear and satisfactory evidence that the transaction was not fraudulent. He must prove not only that the giving of the Blanket Deed of Trust was fair, but also that Decker had knowledge of the consequences, and that no undue influence caused Decker to execute the instrument.

Gilmer's requirement of fairness was satisfied by accident. When Adams and Gilmer first devised the plan to encumber all of Decker's real estate, they had no idea of the value of the realty—they just wanted to include every acre of Decker's realty in the Blanket Deed of Trust. Subsequently, the valuation of the realty in relation to the debt secured was held not to be disproportionate.

Gilmer, however, did not satisfy the other elements of the presumption. In *Thomas v. Turner's Adm'r., supra*, the court held that merely reading and explaining the contract to the client was not enough to prove that the client had sufficient knowledge. Yet in Decker's case, Gilmer did

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not even observe these superficial formalities. As Decker testified: "An explanation as to the legal technicalities of the Deed of Trust or what it imported was not given me." He then explained: "I don't think either one of us really felt that an explanation was necessary, because I don't think now, and I didn't think then, that Mr. Gilmer would do anything that would effect more of an advantage to him than he was entitled to." Though Decker did not request any information because of his reliance on Gilmer, Gilmer still had the absolute duty to inform him fully of the consequences of the transaction.

The third element which Gilmer did not satisfy is that the Blanket Deed of Trust had been given by Decker freely and without undue influence. Of course, this is an impossible burden because every page of the hearing transcripts bears witness to Gilmer's domination and control over Decker.

Gilmer acted as Decker's exclusive attorney and legal advisor from 1955 through September 1961. Almost every deed and every legal document involved in this bankruptcy, including the March 27, 1961, Blanket Deed of Trust was drafted by Gilmer. Gilmer also provided insurance to Decker, endorsed his notes, and became actively involved in the affairs of Decker's Berkeley subdivision. In Gilmer's own words, it also went beyond the business relationship. "We were not only working together in business, but close personal friends."

In *Thomas v. Turner's Adm'r.*, the court said that undue influence was that "influence which naturally springs from a confidential relation." 12 S.E. at 155. It need not be an actual influence consciously and designedly exerted. In Decker's case, he was under such domination that it makes little difference which construction of undue influence is used. Specifically on Gilmer's influence in getting him to execute the Blanket Deed of Trust, Decker said

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that he did not have the ability to refuse to sign it because of the relationship he had with Gilmer.

Many of the incidents in which Gilmer and Decker had dealings bear witness to the undue influence and control which Gilmer, consciously or unconsciously, had over Decker. Gilmer was selling his endorsements to his client at fees of 6% per annum, but Decker was more than willing to pay him as much as 12%, as long as it would not reflect adversely on Gilmer by being a matter of public record. Decker had a general idea of the effect of a deed of trust but he never asked Gilmer about the effect of encumbering all of his assets by the Blanket Deed of Trust, simply because he relied on Gilmer. Decker had no independent source of income but he agreed to the creation of the Reserve and Escrow Accounts which put him in a position of financial servitude to Gilmer. Even though the remaining Berkeley lots were undesirable and Decker had no capital for their development, and though he had previously decided not to purchase more lots, Decker yielded to Gilmer's insistence and continued purchasing these lots under the option. Of course, Decker also executed the Supplemental Deeds of Trust on the newly purchased lots at Gilmer's request because, as Decker himself said, anything that he could do for Gilmer, he did.

The transactions in the present case show quite clearly that Gilmer was in such a dominant position that Decker had virtually no practical choice but to go along with whatever Gilmer directed. This degree of influence, between businessmen, is condoned by the law of the marketplace. But they can hardly be interpreted as the acts of a responsible attorney acting solely with his client's interest at heart. It is patently obvious that, under the law of Virginia, Gilmer has not overcome with clear and convincing evidence, the *presumption* that the deed of trust is void as an abuse of the attorney-client relationship. In spite of

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the overwhelming evidence to the contrary, the District Court, after denying the requested opportunity for oral argument, held that "While Gilmer's influence was a factor in Decker's agreeing to the deed of trust, it cannot be concluded from the evidence that Gilmer's influence was *undue*." This opinion was affirmed by the United States Court of Appeals for the Fourth Circuit in a brief *per curiam* opinion which contained no discussion of this most important question of Virginia law.

II

THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRUSTEE HAD THE BURDEN OF PROVING ACTUAL INTENT TO HINDER, DELAY, OR DEFRAUD CREDITORS AND THAT THE $260,000 BLANKET DEED OF TRUST IS NOT VOID AS A FRAUDULENT TRANSFER UNDER SECTIONS 67d-(2)(d) and 70e(1) OF THE BANKRUPTCY ACT.

Section 67d(2) of the Bankruptcy Act provides as follows:

"Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act, by or against him is fraudulent . . . (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law to hinder, delay or defraud either existing or future creditors."

Since Section 67d(2) is derived from Section 7 of the Uniform Fraudulent Conveyance Act, constructions of the latter are especially helpful in construing the former. It is significant that "hinder, delay or defraud" are in the disjunctive and that under the UFCA only one element need be proved to establish the transfer as fraudulent. As

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stated in 24 Am. Jur., *Fraudulent Conveyances,* Section 11, at 169.

> "a conveyance is illegal if made with an intent to defraud the creditors of the grantor but it is equally illegal if made with intent to hinder and delay them . . . This is true under the Uniform Fraudulent Conveyance Act, and it is true under the Statute of 13 Elizabeth, Chap. 5."

Section 67d(2) of the Bankruptcy Act has been construed in the same manner, so that the intent to hinder and delay creditors is comparable to proof of intent to defraud them. "If this were not true, the words 'hinder or delay,' which usually appear in statutes against fraudulent conveyances, would be meaningless." *Lovett v. Faircloth,* 10 F. 2d 301 (5th Cir. 1925) at 304; *In Re Process-Manz Press, Inc.,* 236 F. Supp. 333 (D.C.E.D. Ill. 1964) at 346.

In *Shapiro v. Wilgus* (287 U.S. 348) this Court held that

> "A conveyance is illegal if made with an intent to defraud the creditors of the grantor but equally it is illegal if made with an intent to hinder and delay them." 287 U.S. at 354.

Of course, this section requires a finding of actual intent as distinguished from intent presumed in law, such as that involved in sections 67d(2)(a), (b), and (c).

In *Coder v. Arts,* 213 U.S. 223 (1909), this Court was of the opinion that the phrase "hinder, delay or defraud" was "familiar to the law of fraudulent conveyances, and was used at common law, and in the statute of Elizabeth, and has always been held to require, in order to invalidate a conveyance, that there be actual fraud . . . Congress, in enacting Section 67e (now 67d), and using the

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terms 'to hinder, delay or defraud creditors', intended to adopt them in their well-known meaning as being aimed at conveyances intended to defraud." 213 U.S. at 242.

Section 67d(2)(d) requires that there must be proof of an actual intent to hinder and delay creditors if such a transfer is to be deemed fraudulent. It is well-settled, however, that there need not be direct evidence of actual intent. "The finding of the requisite intent may be predicated upon the concurrence of facts which lead to the irresistible conclusion that the transferor's conduct was motivated by such intent." 7 Collier (14th Ed.) para. 67.37 at 536. While this does not mean that there is any legal presumption of fraud, it does mean that a fraudulent intent may properly be inferred as a fact from circumstances falling short of direct proof.

In *Shapiro, supra,* this Court stated "Many an embarrassed debtor holds the genuine belief that if suits can be staved off for a season, he will weather a financial storm and pay his debts in full. . . . The belief, even though well founded, does not clothe him with a privilege to build up obstructions that will hold his creditors at bay." 287 U.S. at 354.

Section 70e(1) of the Bankruptcy Act provides that

> "A transfer made . . . by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor."

Section 55-80 Code of Virginia provides, in essence, as follows: Every transfer of any estate given with intent to delay, hinder or defraud creditors from what they are or may be lawfully entitled to, shall, as to such creditors,

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be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appears that he had notice of the fraudulent intent of his immediate grantor.

It is well-settled under Virginia law that a conveyance may be made with the intent to hinder and delay, without any intent absolutely to defraud. Either intent is sufficient. This section is in the disjunctive, and attaches a separate and specific meaning to each of the words which it employs. *Quarles v. Kerr,* 55 Va. (14 Grat.) 48 (1857).

An insolvent debtor is permitted to make a valid conveyance of his assets under this section to a bona fide creditor even though such a conveyance is intended by the grantor to give such creditor a preference. However, the preference must be a lawful one, since good intentions will not validate an unlawful transaction. *Ashworth v. Hagan Estates, Inc.,* 165 Va. 151, 181 S.E. 381, (1935). And it is well settled in Virginia, that a preference is unlawful

> ". . . only where the transfer is not made with the *sole purpose* on the part of the debtor of making a bona fide preference among his creditors, and where that is merely an incident of the transaction, used as a cloak for some other purpose which is fraudulent in actual intent . . ." *Surrat v. Eskridge,* 131 Va. 325, at 335, 108 S.E. 677 (1921) at 680 (Emphasis added).

In the absence of direct proof of the intent to hinder and delay, there are many facts and circumstances which the law admits to be Badges of Fraud. The rule in Virginia is that, where the evidence shows the presence of several of the Badges of Fraud, the burden of proof shifts to him who seeks to uphold the transfer so that he

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must prove an absence of fraud. *Lipman v. Norman Packing Co.*, 146 Va. 461, 131 S.E. 797 (1926).

Some of the Badges of Fraud are (1) the relationship of the parties; (2) the grantor's insolvency; (3) pursuit of the debtor by his creditors; (4) want of consideration; (5) retention of possession by the grantor; (6) transfer of all the property of the debtor. 9 Michie Jurisprudence, *Fraudulent Conveyances* §15.

Although, in *Lipman, supra,* the Supreme Court of Appeals stated the basic principle that

> "Fraud is not assumed on doubtful evidence, or circumstances of mere suspicion. It must be clearly and distinctly proved. The law never presumes fraud, but the presumption is always in favor of innocence and honesty," (citing *New York Life Ins. Co. v. Davis,* 32 S.E. 475, 96 Va. 739, 44 L.R.A. 305). 131 S.E. at 798.

they went on to say that

> " 'Certain circumstances are often referred to as indicia of fraud because they are usually found in cases where fraud exists. Even a single one of them may be sufficient to stamp the transaction as fraudulent. When several are found in the same transaction, strong and clear evidence will be required of the upholder of the transaction to repel the conclusion of fraudulent intent.' " (*Hickman v. Trout,* 3 S.E. 136, 83 Va. 491). 131 S.E. at 799.

Thus, in the presence of the badges or indicia of fraud, the burden of proof shifts to the upholder of the transaction, and the more indices that are present, the heavier this burden becomes.

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The transactions in the present case must be tested by these same well-established legal doctrines set forth above.

Prior to March 27, 1961, when Decker signed the Blanket Deed of Trust, many of his creditors were pressing him for payment. For some time prior thereto, and continuing thereafter, he did not have sufficient capital with which to carry on his business operations. The record shows that as of March 27, 1961, he was insolvent.

Appellee takes the position that the deed of trust was legitimately conceived and designed for the normal business purposes of continuing Decker in business. While it is obviously true that one effect of this instrument was to forestall the inevitable, and thus permit the sale of some 30 additional lots during the spring and summer of 1961, with its accompanying temporary improvement in liquid assets, it can hardly be argued that the major consequence was not to provide Gilmer with more than adequate security.

Since virtually all of Decker's indebtedness was incurred prior to March 27, 1961, had the bank called his loans and forced him into receivership at that time, there would not have been sufficient assets to satisfy all claims. In *Dean v. Davis,* 242 U.S. 438 (1917) this Court held a mortgage void under Section 67e (now 67d), stating

> "A transfer, the intent (or obviously necessary effect) of which is to deprive creditors of the benefits sought to be secured by the Bankruptcy Act, 'hinders, delays, or defrauds creditors' within the meaning of Section 67e." 242 U.S. at 444.

Rarely will a fraudulent transferor or dominating transferee disclose his true intent in a mode capable of direct proof, so unless Section 67d(2)(d) is to be rendered impotent, it must be construed to cover cases where the accumulation of inferences leads to the conclusion of

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fraudulent intent. *Dean v. Davis, supra* states that . . . "It is a question of fact in each case what the intent was with which the loan was sought and made." 242 U.S. at 444.

In the present case the facts show that if Decker had been forced into bankruptcy just prior to the execution of the Blanket Deed of Trust, Gilmer would have been on the same footing with all of Decker's other creditors; without sufficient assets to satisfy all of his claims. By the scheme of this Blanket Deed of Trust, ostensibly to "secure a line of credit", which was subsequently never used for that purpose, and to further secure the Bank, which already had the security of Gilmer's endorsements on its notes, Gilmer was in an infinitely superior position when he drafted the petition for the involuntary adjudication of Decker as a bankrupt on December 11, 1961. By paying the notes, on which he was already liable as an endorser, and receiving an assignment of the Deed of Trust from the Bank, his claim would seem to be protected by a fully perfected lien on virtually all of the bankrupt's property, to the detriment of all other unsecured creditors.

The ostensible purpose of the transaction, continually cited by Gilmer, is that it enabled Decker to obtain more credit from the bank. But an examination of the record shows that, after the execution of this deed of trust, Decker in fact received no new money on this security. He did get a loan of $16,000 with which to pay off the Hallam Tuck bond (the last remaining payment on the original purchase price of the Berkeley property), but the bond was not cancelled; rather, it was kept alive and assigned to Gilmer's collateral fund. Thus, new security was demanded and secured as a condition of making even this loan.

The evidence shows that the "Reserve" account and the

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"Escrow" account, set up as part of the plan to control the proceeds from the sale of lots and houses along with the Blanket Deed of Trust, provided still additional security for Gilmer.

Although the "Reserve" Account was under the bank's control, funds could not be released from that account without Gilmer's consent. Virtually all the funds released by Gilmer were used in a number of ways to improve his own standing as a creditor. Even though Decker was reluctant to continue purchasing his other partners' one-half interest in remaining lots in excess of what he could sell currently, since this would tie up badly needed capital, Gilmer continually insisted that he continue buying lots under the option. Gilmer was thereby able to obtain cash for his interest in the remaining lots, and yet have the lots purchased by Decker simultaneously transferred back as additional security for Gilmer's liability.

Over the eight month period that this "Reserve" Account was in operation, Gilmer and the other partners received $39,375.00 for lots in the subdivision, without any substantial diminution in the amount of real estate secured by the Blanket Deed of Trust.

In addition to the funds released to pay Gilmer and the others for the lots, almost $60,000.00 from the "Reserve" Account was paid to the numerous creditors of Decker. Most of these payments, however, happened to be to creditors who held deeds of trust on Decker's property which were prior to the Blanket Deed of Trust securing Gilmer, thereby improving the priority of his position.

The "Escrow" Account funds were under the complete control of Gilmer and could be released only by his writing a check. Decker would submit construction bills to be paid and Gilmer would pay them from the account. There

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were few profits from the houses, but, when there were, Gilmer customarily used them to pay himself for the many services he had provided, such as insurance, examinations of title, etc.

The Trustee holds that this shows a concurrence of facts upon which the finding of requisite intent may be predicated.

Insofar as intent to hinder and delay, the facts and circumstances, again show a clear pattern towards other creditors. After the execution of the Blanket Deed of Trust, Decker was less at their mercy. When other creditors demanded payment and threatened legal action, Decker and Gilmer could both tell the creditors that there was no point in suing because of the Blanket Deed of Trust. This technique was especially used to handle those creditors who had been pressing Decker just before the Blanket Deed of Trust was executed.

Mr. John Brady of the Internal Revenue Service, for example, visited Decker shortly after the Blanket Deed of Trust was recorded. When Brady inquired about the back taxes that were unpaid, Decker informed Brady about the Blanket Deed of Trust. They even drove to the Court House to see a copy of it, at which time Decker told Brady it covered everything.

Other creditors, such as Mr. Richard Nunley of Charlottesville Lumber Co., were told that if they created any legal problems, the bank would foreclose under the Blanket Deed of Trust and force Decker into bankruptcy. As Decker said, "I hoped it would discourage him from pressing for a judgment, which I didn't feel would help him . . ." Brady, the Internal Revenue Service representative, was told exactly the same thing by Gilmer at a later date.

Even if Decker is not deemed to have had the intent to

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hinder and delay his creditors, this is not dispositive of the issue. As Collier on Bankruptcy states,

> "Where the transferee or obligee is in a position to dominate or control the bankrupt's disposition of his property, *his* intent to hinder, delay or defraud creditors would seem sufficient to render the transfer or obligation fraudulent within Section 67d(2)(d) *without respect to the purpose of the bankrupt transferor.*" 7 Collier (14th ed.) para. 67.37 at 583. (Emphasis added.)

Gilmer's control of Decker's activities was so extensive as to be beyond dispute. The fact that he thereby gained control of all of Decker's real estate plus the proceeds of the sale of lots, provided funds even to meet the expenses for overhead, and even disbursed funds for Decker's personal expenses if any were to be paid, is a good indication of the tremendous influence he had over Decker, even before these outward manifestations came to public view.

Despite Gilmer's protests to the contrary, the Blanket Deed of Trust was foisted upon Decker, not for Decker's benefit, but for the ultimate financial benefit of Gilmer. Gilmer not only wanted to get an advantage over Decker's other creditors by obtaining the security of the Blanket Deed of Trust, but it was also profitable for him to keep Decker in business. As long as Decker avoided bankruptcy, Gilmer could continue collecting for legal services for Decker (and the Berkeley lot purchasers), his insurance coverage, the endorsement fees, and he could even unload his undeveloped and undesirable lots on Decker for cash.

The transactions in the present case show quite clearly that Gilmer was in such a dominant position that he could get Decker to sign the Blanket Deed of Trust by which he acquired a security interest in virtually all of Decker's

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assets. The subsequent acts of both parties clearly show that they used this instrument to hinder and delay other creditors. No amount of denials on their part can overcome the obvious conclusions to be drawn from their subsequent conduct. Many of the Badges of Fraud existed in this transaction.

Tinney Produce Company v. Phillips, 415 F.2d 511 (5th Cir. 1969), was a case involving comparable facts. In that case, Gill was an endorser on promissory notes owed by Tinney Produce Company to the bank. Gill had acquired an option on the stock of the company. Because of this option, he was in a position to cause the company to make certain payments at a time when they were insolvent, including a payment of $16,000 to the bank in reduction of the note on which he was an endorser. The United States District Court for the Southern District of Texas held that the payment of this $16,000 amounted to a fraudulent transfer under the Bankruptcy Act, and this holding was affirmed by the Fifth Circuit.

Although Gilmer was not in control of Decker's affairs by virtue of some office or directorship, he was in control because of his position as Decker's attorney, a position which Virginia regards as fiduciary. Moreover, he had almost total control over Decker's financial transactions, and a dominant influence over Decker personally. Taking all Gilmer's influence and control over Decker as a whole, Gilmer was the *de facto* director of the bankrupt's affairs.

At the very least, this is certainly true in relation to the Blanket Deed of Trust, since Decker executed it only because of Gilmer's influence. As the court said in *Darden* v. *George G. Lee Co. Inc.* (204 Va. 108, 129 S.E.2d 897 (1963), where one occupies a special position of advantage, he has no right to grant himself a preference over

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other creditors; such a transaction ought not to be allowed as a matter of simple justice.

III

THE COURT OF APPEALS ERRED IN HOLDING THAT THE BLANKET DEED OF TRUST, INEFFECTIVE UNDER VIRGINIA LAW AS TO ANY INTEREST IN SPECIFIC PARTNERSHIP PROPERTY, WAS EFFECTIVE AS AN EQUITABLE ASSIGNMENT OF DECKER'S PARTNERSHIP INTEREST.

Section 50-25(2)b of the Virginia Uniform Partnership Act provides: "A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property." Thus the Blanket Deed of Trust is void to the extent that Decker attempted thereby to convey his interest in specific partnership property without his partners' consent.

While Virginia has not yet construed this section of the Uniform Partnership Act, it is clear that the framers of the Uniform Partnership Act intended such assignments to be absolutely void. William Draper Lewis, a draftsman of the Act, has stated:

> "In other words, a partner may assign partnership property for a partnership purpose, but if he attempts to assign the property for his own purposes he makes no assignment at all, because the Act destroys the quality of assignability for any but a partnership purpose." Lewis, *The Uniform Partnership Act*, 24 Yale L. J. 634 (1918).

Moreover, it has been held that the aim of the Uniform Partnership Act is to prevent such an assignment, and

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"the only way to apply it according to its plain purposes is to nullify all attempts at such assignments. The law is that they are void." *Windom National Bank v. Klein* 191 Minn. 447, 254 N. W. 602 (1934); *Shapiro v. United States*, 83 F. Supp. 375 (D. C. Minn. 1949), aff'd. 178 F.2d 459 (8th Cir. 1949).

The Uniform Partnership Act, however, while prohibiting the assignment of specific partnership property, does allow a partner to assign his interest in the partnership, and even though an assignment of specific partnership property is void, the assignee may still succeed to the partner's share of the profits and surplus, *i.e.*, his interest in the partnership at the time of distribution. *Shapiro v. United States, supra.* See also 7 Uniform Laws Anno. 147 (1949).

The basis of the holding in *Shapiro v. United States, supra,* was an elemental point of the law of assignment; namely, that an assignor assigns his interest in the partnership if he has the intent to do so. 6 Am. Jur. 2d, *Assignments* Section 1 at 185. The Court held that the deed of sale of the specific partnership property was to be treated as an assignment of a partnership interest because the agreement "specifically declares that the sale is of Shapiro's interest in the Hillside Apartments Company . . ." 83 F. Supp. at 377.

The intent of the assignor was clear in the above case because it was a stated intent to *sell* his interest in the *Company,* and the Company was the partnership. The District Court in the instant case properly held that the Blanket Deed of Trust, insofar as it purported to assign any interest whatsoever in the specific partnership property, was prohibited by Section 50-25(2)b of the Virginia Uniform Partnership Act. But the District Court went on to state that "if a person may make an equitable assignment of a chose in action by words alone, a deed

signed, sealed, delivered, acknowledged and recorded, should likewise suffice," and held that the Blanket Deed of Trust was effective as an equitable assignment of Decker's partnership interest. This holding ignores the facts of the case and is contrary to the law of the Commonwealth of Virginia.

The main question thus raised is whether, under Virginia law, a deed of trust constitutes an assignment. The "lien theory" applies in Virginia as regards deeds of trust. In 13 Michie's Jurisprudence *Mortgage and Deeds of Trust*, page 203, it is stated:

> "It is well at this point to dispose of the question as to whether a mortgage or deed of trust operates to pass title out of the mortgagor or merely creates a lien. The lien theory is the prevailing view and is firmly established in Virginia where it is said that 'the essence of a mortgage or deed of trust is that it creates a lien on property to secure a debt'."

Under the lien theory, deeds of trust merely create a lien on the property, and do not transfer either legal or equitable title. The Blanket Deed of Trust could not have constituted an equitable assignment of Decker's partnership interest, as the District Court held, because a deed of trust, under Virginia law, transfers no title *in praesenti* whatsoever, either legal or equitable. Even if the Blanket Deed of Trust could have constituted an equitable assignment of Decker's partnership interest, it is voidable under Section 60 of the Bankruptcy Act. Section 60a(2) states that a transfer of personal property, if not perfected, shall be deemed to have been made immediately before the filing of the petition. It would thus, under the facts of this case, be a voidable preference.

The Supreme Court of Appeals of Virginia, in *Wood-*

son v. Gilmer, 205 Va. 487, 137 S.E.2d 891 (1964), found that the Blanket Deed of Trust was drafted by Gilmer, an experienced attorney, and repeatedly employed the use of partnership terminology, such as "partners", "partnership" and "dissolution", and that the intent of all parties was conclusive as to the existence of the partnership. The question of intent is thus *res adjudicata* under the law of Virginia, notwithstanding Gilmer's testimony to the contrary.

The facts in the present case show that the idea for the Blanket Deed of Trust originated between Gilmer and Adams. Gilmer was an experienced attorney, presumably knowledgeable of Virginia law. The Blanket Deed of Trust was drafted by Gilmer. Virginia follows the majority rule as to construction of deeds that a deed will be construed most strongly against the party using the words or preparing the deed, in case of ambiguity. This rule has been held especially true where the grantor is a practicing lawyer or where the deed was prepared by the grantor's attorney. However, where the deed was prepared by the grantee, it will be strictly construed against him. 26 C.J.S. *Deeds* § 82(e). Yet the District Court, in interpreting this instrument, looked for *Decker's* intent rather than *Gilmer's* intent, and held that "Decker himself would not be permitted to repudiate this solemn instrument, and the Trustee, standing in his shoes, is in no better position." This was affirmed in a *per curiam* opinion by the United States Court of Appeals for the Fourth Circuit.

IV

THE COURT OF APPEALS ERRED IN HOLDING THAT TWO SUPPLEMENTAL DEEDS OF TRUST EXECUTED BY AN INSOLVENT ON $40,500 WORTH OF REAL PROP-

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ERTY ARE NOT VOID UNDER THE BANKRUPTCY ACT SECTION 67d(2)(a) AS FRAUDULENT TRANSFERS WHEN GIVEN AS ADDITIONAL SECURITY FOR AN ANTECEDENT DEBT OF $249,000, ALREADY FULLY SECURED BY A BLANKET DEED OF TRUST ON REAL PROPERTY VALUED AT OVER $300,000.

Section 67d(2) of the Bankruptcy Act considers as fraudulent those transfers, within one year prior to the filing of the petition, which are made or incurred without fair consideration by a debtor who is insolvent, without regard to actual intent. "Fair consideration" is defined in Section 67d(1)(e) as "consideration given . . . (2) when such property or obligation is received in good faith to secure . . . [an] antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained."

The evident purpose of this subdivision is to enable a creditor to obtain security for an unsecured obligation subject to an outer economic limitation.

Although § 67d(1)(e) does *not* provide that a fully secured creditor may obtain additional security for an obligation owed to him, the District Court held that additional security will be allowed as long as the debt is not disproportionately small in relation to the *cumulative* security. The District Court apparently felt that such a construction should be adopted because the disallowance of such an overall economic test would result in a situation where a debt of $249,000 could be secured by property worth $344,000 in one case and yet in another case, where the same amount is secured by only $300,000, the giving of the additional $44,000 security would be refused simply because it was not given in one transaction.

The problem inherent in this economic construction is

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that it points to a seemingly anomalous result while ignoring the reason for it. Recognizing that the value of security given to adequately secure a debt is a matter of judgment, the courts have construed the economic test of Section 67d(1)(e) rather liberally. Thus, a $249,000 debt secured by property worth $344,000 is probably fair consideration. However, the need for such a test vanishes where the debt has already been fully secured, because the judgment of the parties concerning the value of the security—which necessitated the economic test in the first place—has already been made, and *the debt is now fully secured.*

If Section 67d(1)(e) is considered within the context of the Bankruptcy Act, rather than isolated from it, the error of the District Court's construction becomes even clearer. The Act itself generally purports to favor general creditors over secured creditors, though it will protect the latter. Thus, it is perfectly consistent that the purpose of Section 67d(1)(e) is not to enable the creditor to obtain the *most* security, but only to obtain full security.

Any attempt to make the overall economic effect of the transaction the dominant one ignores both the purpose of the section and the fact that the test of fair consideration is not purely economic, but statutory. The economic test is merely a tool which allows unsecured creditors to become secured up to a certain economic level. Just because it serves as the absolute outer limits of fair consideration does not mean that Section 67d(1)(e) gives the creditor the *right* to reach those limits. There can be full security well within those limits, and this is all with which Section 67d(1)(e) is concerned. Once the creditor has become fully secured, the economic test is no longer relevant.

Though there are no cases precisely on point under

the Bankruptcy Act, it is a view which has been recognized at common law. Thus, where a mortgage is otherwise abundantly secured, the taking of additional security will itself be considered as evidence of fraud, "for creditors will not be permitted to pile security on security unnecessarily, to the detriment of other creditors." *Jaffrey v. Wolf*, 40 Okla. 303, 47 P. 496, 500 (1896). It has also been stated that where the debt for which a mortgage is given was already amply secured by another mortgage, a pretty strong case of fraud is made out. *Crapster v. Williams*, 21 Kan. 109 (1876).

It has been generally stated in construing Section 5 of the U. F. C. A. (from which Section 67d(2) of the Bankruptcy Act is derived) that transfers made to benefit third parties are clearly not for a "fair consideration." *Davis v. Hudson Trust Co.*, 28 F.2d 740 (3rd Cir. 1928), cert. denied, 278 U.S. 655. However, no reported case involving a transfer for the benefit of a surety has yet arisen under either the U. F. C. A. or the Bankruptcy Act.

On June 7 and August 4, 1961, Decker executed supplemental deeds of trust, at Gilmer's request, on fifteen and eleven lots respectively. Neither Gilmer nor the bank had furnished any new consideration for these additional deeds of trust. The $16,000 borrowed by Decker in July of 1961 was not consideration for these supplemental deeds of trust because Decker was required to give the Tuck bond as collateral in order to obtain that loan.

The release of lots from the lien of the Blanket Deed of Trust for the purpose of sale is also not new consideration for these Supplemental Deeds of Trust. As the Court stated in *Gilmer v. Woodson, supra,* the fact that Gilmer had voluntarily relinquished an even better position earlier is wholly immaterial.

Under the facts of this case, there is no doubt that, ac-

cording to law, the transfer was to the bank. But the fact is that the bank was already secured both by the Blanket Deed of Trust and by Gilmer's endorsement. Gilmer was the only person who profited by the additional security.

In holding that there was no evidence in the record to substantiate the conclusion that there was an intent to hinder and delay when the Supplemental Deeds of Trust were executed, the District Court ignored the ample circumstantial evidence. When Gilmer requested these Supplemental Deeds of Trust in June and August, 1961, all of Decker's property had been encumbered, his capital was practically non-existent, the little capital he did have was frozen by the use of the "Reserve" and "Escrow" Accounts, the numerous creditors who had been continually put off were becoming increasingly demanding, and Decker was insolvent. The request for the Supplemental Deeds of Trust under these circumstances raises the inference that Gilmer was arranging to take for himself every bit of Decker's property at a time when bankruptcy proceedings were obviously imminent.

The District Court also neglected to consider that the presence of the Badges of Fraud have shifted the burden of proof to Gilmer. Under Virginia law, it is Gilmer who must prove that these Supplemental Deeds of Trust were executed with the *sole intent* of effecting a bona fide preference, and for no other purpose. Otherwise, the transfer will be deemed an unlawful preference, and voidable.

Even disregarding the shift of the burden of proof, the Supplemental Deeds of Trust cannot be considered a lawful preference because of Gilmer's domination and control over Decker's affairs. Where one exercises such a degree of control and then receives a preference, that preference is unlawful under Virginia law. *Darden v. George G. Lee Co. Inc., supra.*

By the summer of 1961, Gilmer's control was beyond

dispute. He had actual control over all Decker's assets, and with this control he had knowledge of Decker's insolvency. Nonetheless, Gilmer preferred himself over the other general creditors by requesting the Supplemental Deeds of Trust, a request which Decker could not refuse, and which hindered and delayed Decker's other creditors. This is the type of transfer which was specifically forbidden in *Darden, supra.*

CONCLUSION

It is respectfully submitted that this case involves both important questions of federal law not decided by this court and also important questions of state law where the established rule of law as determined by the Virginia Supreme Court of Appeals was disregarded or misapplied by the lower court. For these reasons, this petition for a writ of certiorari should be granted.

B. B. WOODSON, TRUSTEE
by Robert M. Musselman
Counsel

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,337

B. B. WOODSON, TRUSTEE

Appellant,

vs.

GEORGE GILMER,

Appellee.

In the Matter of:
Sterling R. Decker, Bankrupt.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. Ted Dalton, Chief District Judge.

(Argued December 5, 1969 Decided January 30, 1970.)

Before BRYAN, WINTER and BUTZNER, Circuit Judges.

Robert M. Musselman and Richard F. Papcun for Appellant, and Carl E. Hennrich for Appellee.

PER CURIAM:

The trustee in bankruptcy of Sterling R. Decker indi-

vidually and of Decker and his wife as partners, here again attacks the validity of a deed of trust given by the bankrupts on March 27, 1961 upon an undeveloped tract of 110.68 acres in Albemarle County, Virginia to secure the payment of a bearer bond of $260,000. This obligation was pledged at the Peoples National Bank, Charlottesville, Virginia, as collateral for Decker's promissory notes held by the bank and also to protect the endorsement of George Gilmer upon them. Also attacked are two supplemental deeds of trust dated, respectively, June 7, 1961 and August 4, 1961, executed by the bankrupts as additional security for the $260,000 bond, but conveying land not then under the March 27, 1961 deed of trust.

The Federal District Court for the Western District of Virginia rejected the trustee's contentions on all three instruments, and we affirm.

In Gilmer v. Woodson, 332 F2d 541 (4 Cir. 1964) this court overruled a sortie upon the March 27, 1961 deed of trust grounded on the assertion that it was a fraudulent transfer under either section 67(d)(2)(a) or (d)(2)(d) of the Bankruptcy Act, 11 USC 107(d)(2)-(a) and (d)(2)(d).[1] The present strictures upon this trust invoke, among others, these same statutes. Res judicata does not bar the case against the initial deed of trust of $260,000, the trustee interjects, because *Gilmer*

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1. Section 67(d)(2) of the Bankruptcy Act, 11 USC 107(d)(2), provides as follows:

"Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; * * * or (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors."

v. *Woodson's* words of remand, 332 F2d at 548, allow a retrial of these issues. Since this argument was not controverted or resolved in the District Court, it will not be further mentioned.

The factual history of this litigation was fully recorded in the previous appellate report of the case, and the past as well as the subsequent events were carefully laid out by Judge Dalton in his statement of findings of fact and conclusions of law now in review. He comprehends the earlier as well as the new issues made in this case. We have no reason to question his findings and we accept his legal conclusions. Further dissertation upon the basis and outcome of this case would be a useless repetition. We affirm on the District Judge's statement. In re Sterling R. Decker, et al., 295 FS 501 W.D.Va. 1969).

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 13,337

B. B. WOODSON, TRUSTEE

Petitioner,

v.

GEORGE GILMER,

Respondent

In the Matter of
Sterling R. Decker, Bankrupt

ORDER DENYING PETITION FOR REHEARING

The petition of the appellant, B. B. Woodson, Trustee in Bankruptcy, for a rehearing is hereby denied, the Court concluding that the grounds urged therefor do not warrant it.

For the Court:

United States Circuit Judge
ALBERT V. BRYAN

Filed
Feb. 19, 1970
Samuel W. Phillips
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

IN THE MATTER OF **Sterling R. Decker and Sterling R. Decker & Mary Jane Decker, Partners, t/a Berkeley Community Builders, Bankrupt**	**In Bankruptcy Number 706 and 707** ***OPINION* and *JUDGMENT*** **By: Ted Dalton** **U. S. District Judge**

The questions presented in this proceeding arise out of petitions for review of two orders of the referee in bankruptcy concerning Sterling R. Decker and Mary Jane Decker, his wife and partner, trading as Berkeley Community Builders.

The first order dated September 11, 1968, reaffirms the referee's conclusions contained in a previous order of June 26, 1967, which had been reconsidered in the light of additional pleadings and oral argument. The order of September 11, 1968, concerns issues upon remand from a decision of the Court of Appeals for the Fourth Circuit, *Gilmer v. Woodson*, 332 F.2d 541 (4th Cir. 1964), which upheld the validity of a deed of trust, dated March 27, 1961, securing a bond of the same date in the amount of $260,000. Upon remand the trustee in bankruptcy, B. B. Woodson, renewed his attacks on the validity of this deed of trust under the provisions of sections 67(d) and 70 of the Bankruptcy Act, 11 U.S.C. §§107(d) and 110. The referee reaffirmed the validity of this deed of trust

by the order dated September 11, 1968, and the trustee now petitions for review of such order.

The other order herein reviewed is dated August 23, 1968, and deals with the validity, under section 67(d)(2) of the Bankruptcy Act, of two supplemental deeds of trust executed by the bankrupt as additional security for the $260,000 bond mentioned above. The order of August 23, 1967, held these two supplemental deeds to be fraudulent transfers, and from this order George Gilmer, a creditor of the bankrupt, petitions this court for review.

The facts, as gleaned from the voluminous records of these proceedings and as found by the referees, the Court of Appeals for the Fourth Circuit in *Gilmer v. Woodson*, 332 F.2d 541 (4th Cir. 1964), and the Supreme Court of Appeals of Virginia in *Woodson v. Gilmer*, 205 Va. 487, 137 S.E.2d 891 (1964), are as follows.

In December, 1956, Sterling R. Decker and Charles Hurt purchased a tract of 110.68 acres of land in Albemarle County, Virginia, for the purpose of developing and selling the land as residential lots. On April 26, 1957, Hurt conveyed a two-sixths interest in the property to George Gilmer, Sr., and George Gilmer, Jr., pursuant to an agreement executed the same day by the Gilmers, Decker and Hurt. A few days thereafter Hurt conveyed his remaining one-sixth interest in the property to David J. Wood, Jr., and Joseph M. Wood, II. By an addendum to the April 26th agreement, signed by the Gilmers, the Woods, and Decker, the parties agreed that the two Woods were accepted as partners by the other parties in place of Hurt.

The agreement of April 26, 1957, provided that Decker would manage the development of the subdivision of the 110.68 acres of land, known as "Berkeley." Assessments for roads and other improvements were to be made by Decker and were to be borne by all the partners. Decker

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was given the option to purchase the one-half interest of his co-owners in the first fifty-three lots at the rate of $1,000 per lot, and in additional lots at the rate of $1,250 per lot, provided that he purchase at least three lots per month beginning in 1958. Questions of policy were to be decided by vote of the owners, who would vote according to their respective shares of the property. Although there is no provision in the agreement expressly dealing with the manner in which profits were to be shared, it appears that Decker was to derive his own profits, if any, from the resale of lots after he had exercised his option in purchasing the outstanding interests of the co-owners. This agreement, together with the subsequent business transactions and conduct of the parties, was sufficient to convince the Supreme Court of Appeals of Virginia that a partnership existed between Decker, the Gilmers and the Woods, "to pool their land and money, and in some instances talent and labor, for the improvement of the property." *Woodson v. Gilmer*, 205 Va. at 493, 137 S.E.2d at 895.

In 1957 Decker began the development of the Berkeley property in partnership with his wife under the name of Berkeley Community Builders. In the development of Berkeley subdivision, entailing the purchase of his partners' outstanding interests in the lots, the furnishing of utilities, the resale of the lots and building houses thereon for the ultimate purchasers, Decker required large amounts of capital which he could not provide. He therefore arranged with Mr. Adams, an officer at the Peoples National Bank (now the Virginia National Bank), to obtain funds from the bank upon the personal credit of George Gilmer, Sr., who was a close friend of Decker and was his attorney throughout the period here discussed. Under this arrangement, Decker would secure the necessary funds by executing unsecured promissory

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notes, obtaining the endorsement of Gilmer thereon for a fee.

This credit arrangement with Gilmer and the bank continued for approximately two years, during which time it clearly appeared that when Decker devoted his time and attention to the Berkeley project it could be made a highly profitable operation. A large number of lots, said to be ninety, were sold by Decker prior to the early months of 1961. However, Decker began to neglect the Berkeley project, apparently because of involvement in unrelated ventures which attracted his interest and, as it turned out, depleted his resources. Without the knowledge or consent of Gilmer or the bank, Decker had been diverting funds borrowed through Gilmer's credit to his other business ventures. Several of Decker's creditors began pressing him for payment, and on several occasions the Deckers' checking account was overdrawn.

Both Mr. Adams at the bank and Gilmer became aware of the unsatisfactory condition of Decker's financial affairs in early 1961. As of March 27, 1961, the bank was holding promissory notes made by Decker and endorsed by Gilmer totaling $249,199.31. In view of this heavy financing of Decker, both Gilmer and Adams decided that some sort of control over Decker's financial affairs would be necessary in order to keep track of his activities and get him to concentrate his efforts on the Berkeley project. In the discussions between Gilmer and Adams in the weeks preceding March 27, 1961, it was suggested by Adams, and agreed to by Gilmer, that Decker should put up some security for his notes with the bank.

On March 27, 1961, Decker and his wife executed a deed of trust covering virtually all of their real estate, together with a bond payable to bearer on demand in the amount of $260,000, with interest at the rate of 6%, secured by the deed of trust. The bond and the deed of

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trust were held by the bank as collateral security for the payment of the promissory notes executed by Decker and endorsed by Gilmer. The testimony of Adams, Gilmer and Decker concerning this transaction is not in conflict. Gilmer explained that the purpose of the deed of trust was, first, to secure the indebtedness, second, to have a base upon which Decker could continue to be financed, and third, to restrict Decker's activities to Berkeley.

Contemporaneously with this plan, an "escrow" account, under the control of Gilmer, and a "reserve" account under the control of the bank and Gilmer, were set up to handle the income and expenses attributable to the Berkeley project. Proceeds from the sales of lots by Decker were to be deposited in the "reserve" account. With the approval of Gilmer, Adams would draw checks on the "reserve" account for payment of the various expenses of the Berkeley project, for payment of Decker's personal obligations, and for purchases by Decker of the outstanding interest of the other partners in Berkeley lots. Funds deposited in the "escrow" account would arise from the proceeds of the construction of houses by Decker for purchasers of Berkeley lots.

The $260,000 bond was drawn in an amount in excess of the then aggregate amount of Decker's notes endorsed by Gilmer to enable the bank to subsequently lend more money to Decker and bring these loans under the security thus afforded. However, there was no definite understanding among the bank, Gilmer and Decker as to the extent of future credit to be afforded Decker, other than that the amount of Decker's debt would first be reduced.

In the spring and summer of 1961, the Berkeley project took an upturn under Decker's management. According to Decker's testimony, approximately thirty lots were sold and the construction of houses on several of

these lots was undertaken. However, it does not appear that these sales were primarily due to the new financing plan. Decker testified that the sales occurred because it was the spring of the year, the usual time for such sales. The chief contribution of the bank and Gilmer seems to have been the bank's extension of credit to purchasers under the security of the blanket deed of trust, Gilmer's management of the reserve and escrow accounts, and deferment of collection of the overdue notes of the bankrupt. As stated by the referee:

> This deferment was undoubtedly due to the fact that through the new financing plan the services of Decker were retained to promote and conduct the continued development of properties in the Berkeley project. Decker alone sold the lots and sold the contracts for construction of dwellings. These sales by Decker introduced new lines of credit offered by the purchasers. This permitted a liquidation of Berkeley lots and the prospect of construction profits without either the bank or Gilmer assuming any additional risk from Decker's venture.

Between June and October, funds from the sales of lots, totaling $76,397.37, were deposited in the reserve account. During the same period checks totaling a like amount were drawn by the bank, under Gilmer's direction, of which approximately $21,000 went toward reducing the indebtedness of Decker and his wife, about $16,000 went to the two Gilmers and the two Woods in payment for their outstanding one-half interest in various Berkeley lots, and the balance went to Decker's other creditors. Proceeds from construction contracts were deposited in the escrow account, and the surplus after payment of construction costs went, at least in part, to Gilmer in payment of some of Decker's notes payable to Gilmer for his legal services.

On four occasions subsequent to March 27, 1961,

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Decker and his wife executed supplemental deeds of trust conveying the one-half interest in Berkeley lots which Decker had acquired from the Gilmers and the Woods after March 27, 1961. These supplemental deeds of trust were given solely as additional security for the $260,000 demand bearer bond.

The first two of these supplemental deeds of trust, dated June 3, 1961, and July 26, 1961, conveying in trust a one-half interest in twenty-seven lots, are the subject of the referee's order of August 23, 1968.

The last two deeds of trust were similar to the first two, and were the subject of an appeal to the Court of Appeals for the Fourth Circuit in *Gilmer v. Woodson*, supra. In that decision the court held that the two supplemental deeds of trust were voidable preferences under section 60(a)(1) of the Bankruptcy Act, 11 U.S.C. §96(a)(1), having been given within four months of bankruptcy as additional security for an antecedent debt. This ruling has no relevance to the question of the two deeds of trust herein considered.

In spite of the spring and summer sales, Decker's creditors continued to hound him, and those who weren't paid were no longer satisfied with promises. On November 15, 1961, the bank found it necessary to demand payment of all the Gilmer-endorsed notes either made or endorsed by Decker. On that date all these notes were paid by Gilmer, to whom they were then assigned by the bank. The notes on which Decker and his wife were the makers amounted to $247,275.00.

On December 11, 1961, Gilmer and others filed a petition for the involuntary adjudication of Decker and the Berkeley Community Builders partnership as bankrupts. Shortly thereafter Decker filed a bill of complaint in the state court, alleging that a partnership existed between him and the defendants, the Gilmers and the Woods, and

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praying that the court direct the winding up of the partnership affairs. The question of whether a partnership existed was ultimately decided by the Supreme Court of Appeals of Virginia in *Woodson v. Gilmer,* supra.

Decker was adjudicated a bankrupt on January 12, 1962. By his order of July 3, 1962, the referee found as facts that as of March 27, 1961, the bankrupts were short of working capital and insolvent. The referee further found the blanket deed of trust did not materially curtail Decker's business, that the deed of trust was not executed with bankruptcy in mind, that it was not executed in order to hinder, delay or defraud creditors, and that the antecedent debts which the deed of trust was given to secure were "fair consideration" within the meaning of sections 67(d)(1)(e) and 67(d)(2)(a), (b) and (c) of the Bankruptcy Act. These findings were affirmed by the Fourth Circuit Court of Appeals in *Gilmer v. Woodson,* supra, and the case was remanded to this court for further proceedings.

Order of September 11, 1968

The first question presented for determination by this court concerns, once again, the validity of the March 27, 1961, blanket deed of trust. The trustee contends that this deed of trust is void in whole or in part on several grounds: (1) The evidence presented at hearings both prior to and subsequent to the remand of this case clearly establishes that contrary to the holding of the Court of Appeals, the blanket deed of trust was not given in good faith and for fair consideration, and that it was given with actual intent to hinder, delay and defraud creditors within the meaning of section 67(d) of the Bankruptcy Act; (2) The deed of trust is voidable under section 70(e)(1) of the Bankruptcy Act and §50-80 of the Virginia Code

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(1950) as a fraudulent conveyance under the law of Virginia; (3) The description of the land sought to be conveyed by the fourth paragraph of the deed of trust is vague, uncertain, and ambiguous, and, as a matter of law, inadequate to transfer any interest in the land therein described; (4) This fourth paragraph of the deed of trust is void by reason of section 25(2)(b) of the Uniform Partnership Act, Va. Code §50-25(2)(b) (1950), since it is an attempted conveyance by a partner of his interest in specific partnership property; and (5) The deed of trust is voidable under §70(e) of the Bankruptcy Act in that it was obtained by Gilmer through abuse of the attorney-client relationship then existing between Gilmer and Decker.

As to the first contention of the trustee, the referee found that the evidence introduced since the remand of this case tends only to amplify previous testimony. Both this court and the Court of Appeals found substantial support for the findings of the previous referee. The referee and this court are mindful of the statement of the Fourth Circuit Court of Appeals that where a referee's findings are based on conflicting evidence, the reviewing court should not disturb them unless there is "most cogent evidence of mistake and miscarriage of justice." *Gilmer v. Woodson,* supra, 332 F.2d at 546. Accordingly, and in view of the holding of the Court of Appeals, this court concludes that the March 27, 1961, blanket deed of trust was given for fair consideration and without actual intent to hinder, delay or defraud creditors.

The trustee next relies on section 70(e)(1) of the Bankruptcy Act in asserting that the deed of trust is fraudulent as to creditors under the Virginia fraudulent conveyance statute, Va. Code §55-80 (1950).

The Virginia statute, like section 67(d)(2)(d), requires an intent on the part of the debtor to delay, hinder

or defraud creditors. One difference in the application of the two statutes, if indeed one exists, is the proof necessary to infer a fraudulent intent. Section 67(d)(2)(d) requires proof of "actual intent, as opposed to intent presumed in law," while under Va. Code §55-80, a court may indulge in presumptions of fraud based upon suspicious circumstances, or "badges of fraud," attending the transaction. See 4 *Collier on Bankruptcy* ¶67.37 p. 530 (1967); 9 *Michie's Jurisprudence,* Fraudulent and Voluntary Conveyances, §15 (1950). A further distinction is that the Virginia statute reads that it "shall not affect the title of a purchaser for valuable consideration, unless it appears that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor."

The Virginia courts require that circumstantial evidence of fraud be "clear and convincing, and such as to satisfy the conscience of the chancellor, who should be cautious not to lend too ready an ear to the charge." *Hutcheson v. Savings Bank,* 129 Va. 281, 289, 105 S.E. 677 (1921); *Redwood v. Rogers,* 105 Va. 155, 53 S.E. 6 (1906). The evidence of fraudulent intent on the part of Decker was insufficient to convince the referee of any such actual intent, and it is doubtful that a Virginia court would be more receptive to the charge. But even assuming that the inference of fraudulent intent on the part of Decker would be justified, attributing a like design to Gilmer is not. Gilmer testified that he had little or no knowledge of Decker's precarious financial condition at the time the deed of trust was executed, and Decker admitted that he was less than candid with Gilmer regarding the extent of his indebtedness at that time. It must be concluded that the trustee's burden of proof has not been met in this respect.

The Trustee's contention that the description of the

land sought to be conveyed by the fourth paragraph [1] of the March 27, 1961, deed of trust is inadequate as a matter of law was properly rejected by the referee. There can be no doubt that the parties understood what property it was intended to convey. Deeds containing no description have been held valid as between the parties to the conveyance. ***Mundy v. Vawter***, 44 Va. (3 Grat.) 518 (1847). And even a stranger to the deed of trust, by following the references in the deed, could locate the property to his satisfaction. Under Virginia law, no more is required. See *Smith v. Bailey*, 141 Va. 757, 127 S.E. 89 (1925).

The trustee's fourth argument presents novel questions under Virginia's Uniform Partnership Act, Va. Code Ann. §§50-1, et seq. In essence, the argument is that some of the land which the fourth paragraph of the blanket deed of trust attempts to convey is partnership property; that Va. Code Ann. §50-25 (b) (2) forbids the assignment of a partner's interest in specific partnership property except in connection with the assignment of the rights of all partners in the same property; that Decker's partners did not join in the deed of trust; and that, therefore, the deed of trust, insofar as it attempts to assign

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1. "FOURTH: All interest acquired by Sterling R. Decker in 110.68 in Albemarle County, Virginia, fronting on the west side of Route 29, north of Charlottesville, and the south side of State Route 631, except parts or interest conveyed all by deeds recorded before this date and the dedication of streets and easements for electric and telephone lines, and water and sewer pipes as shown on plats of record or in deeds of record. This includes a one-half interest in this land as conveyed to Sterling R. Decker by W. Hallam Tuck and wife by deed dated December 24, 1956, recorded in D. B. 330 p. 244, and a part of this is subject to deed of trust from Sterling R. Decker and others conveyed to Magruder Dent, Jr., and George Gilmer, Trustees, dated January 17, 1957, and recorded in D. B. 330 p. 245, reduced by payments of $15,087.50. The other half interest of parts has been conveyed to Sterling R. Decker by David J. Wood and others, by deeds of record in . . . . Some of these lots are subject to deeds of trust."

partnership property, is void. Gilmer contests not only this conclusion, but the premises as well.

Whether the 110.68 acres of land referred to in the fourth paragraph constitute, at least in part, partnership assets, is a question which is all but foreclosed by the decision of the Supreme Court of Appeals of Virginia in *Woodson v. Gilmer*, supra. Gilmer reluctantly concedes as much.

It is likewise clear that the fourth paragraph of the deed of trust purports to convey an undivided one-half interest in this land, which at the time of the conveyance was in part partnership property and in part the individual property of Decker. The partnership agreement provided that Decker could purchase one-half interests in specific lots from the other partners. Decker acquired these lots as his individual property by means of several deeds, thirteen of which are referred to in the fourth paragraph of the deed of trust, executed by the Gilmers and the Woods. Nothing in the Uniform Partnership Act was intended to prevent partners from transferring partnership property among themselves, assuming all the partners consent to such conveyances. *Goldberg v. Goldberg*, 375 Pa. 78, 99 A.2d 474 (1953); *Becker v. Hercules Foundries, Inc.*, 263 App. Div. 991, 33 NYS 2d 367 (1942), *App. denied* 264 App. Div. 721, 34 NYS 2d 524. To the extent that the land was Decker's individual property, the deed of trust cannot be assailed by the trustee as an ineffective conveyance.

To the extent that the land was partnership property, Va. Code Ann. §50-25(2)(b) must be considered. Section 50-25(2)(b) provides: "A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property." It is a basic rule of statutory construction that this section cannot be read alone, but must

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be construed with reference to other sections of the Uniform Partnership Act. See *Stilgenbaur v. United States*, 115 F.2d 283 (9th Cir. 1940). While no Virginia decision has interpreted this section of the partnership act, the act has been interpreted in many of the more than thirty states which have adopted the Uniform Act. See 29 ALR 2d 1365. Va. Code Ann. §50-4(4) requires that the act be construed so as to effect its general purpose to make uniform the law of those states which enact it.

Section 24 of the partnership act, Va. Code Ann. §50-24, provides that a partner's property rights are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management. Section 25(1) of the act states that a partner is co-owner with his partners of specific partnership property holding as a tenant in partnership. The incidents of a partner's tenancy are such that the partner, subject to any contrary agreement, has an equal right "to possess specific partnership property for partnership purposes, but he may not possess such property for any other purpose without the consent of his partners." Va. Code Ann. §50-25(2)(c). Moreover, a partner's right in specific partnership property cannot be assigned by the partner, nor is it subject to attachment or execution, without the consent of all the partners. Va. Code Ann. §50-25 2(b) and (c). The consent of all the partners, either expressed or implied, is the source and limit of a partner's right to deal with partnership property for whatever purpose.

The reasons for this are obvious in view of the nature of a partner's right in specific partnership property—his right to possess and use the property for a partnership purpose. If the law recognized the right of a partner to assign his right in particular partnership property to a third person, the assignee would pro tanto become a part-

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ner, since he would have the right to possess the property for a partnership purpose irrespective of the desires of the other partners. But partnership is a voluntary relation, and the other partners cannot have a new partner thrust upon them without their consent. See Commissioners Note, 7 *Uniform Laws Anno.* Partnership p. 145 (1949).

Sections 9 and 10 of the Partnership Act, Va. Code Ann. §§50-9, 10, spell out the extent of a partner's authority to act for and bind the partnership in the absence of any express authority. However, implicit in these rules is the fundamental rule of agency law, that where the partner's act is authorized, as where the other partners consent to the act, the partnership is bound thereby. In determining whether such consent exists, the rules of agency law apply. Consent may arise by means of an express or implied agreement, and may be inferred from the conduct of the partners either before or after the act of the partner. See 1 *Rowley on Partnerships* §9.1-D(3) (1960). Where this consent of all the partners exists, a partner may assign his interest in specific partnership property to his other partner, or partners. *Goldberg* v. *Goldberg*, 375 Pa. 78, 99 A.2d 474 (1959), *Williams* v. *Dovell*, 202 Md. 351, 96 A.2d 484 (1953); or to a third party either for his own or for partnership purposes, see *Liberty Savings Bank* v. *Campbell*, 75 Va. 534 (1881); *Commissioner* v. *Whitney*, 169 F.2d 562 (2nd Cir. 1948); see also *Becker* v. *Hercules Foundries, Inc.*, supra, 263 App. Div. 991, 33 NYS 2d 367 (1942). It follows that where the assignment by a partner of his interest in specific partnership property is not authorized, the assignment is ineffective as such by virtue of section 25(b)(2). *Gold Fork Lumber Co.* v. *Sweany & Smith Co.*, 35 Idaho 226, 205 P. 554 (1922); *Windom National Bank* v. *Klien*, 191 Minn. 447, 254 N.W. 602 (1934); *Shapiro*

v. *United States*, 83 F. Supp. 375 (D. C. Minn. 1949) *aff'd*, 178 F.2d 459 (8th Cir. 1949).

The question in this case is whether Decker's assignment of his interest in specific partnership property was authorized. The debts for which the deed of trust was given as security were Decker's individual debts, and hence the assignment by Decker cannot be said to be for a partnership purpose, nor is it so contended by Gilmer. Rather, Gilmer argues that since no partner objected to the deed of trust, their consent, and hence Decker's authority, may be inferred from their silence. The difficulty with this argument is that the partner's lack of objection can be interpreted in several ways. It could mean that Decker had the authority to assign as security for his personal debts the interests of all the parties in the partnership property. This was hardly the case, since there is nothing in the record to indicate that the partnership intended to assume the debts of Decker. Also, it would mean that Gilmer through his partner and agent, Decker, was assigning his interest in the partnership property as security for debts which ultimately were owed to Gilmer. Another possibility is that Decker had the authority to convert his interest in partnership property into his own separate estate merely by executing a conveyance to a third party. While we have found nothing in the law of Virginia which prevents such a result, we have found nothing in the record which would permit such a conclusion. The partnership agreement stipulated how Decker could acquire the interest of the other partners in the partnership property. Decker had the option to purchase the outstanding interests of the other partners at specified prices. This option was repeatedly exercised by Decker, and in each case the one-half interest of the other partners in the various lots were conveyed to Decker by deeds executed by the Gilmers and the

Woods. This course of conduct does not permit the inference that Decker was authorized to effect a partition of the partnership property by other means. Most likely the silence of the other partners was due to their assumption that the deed of trust, which purported to convey only Decker's interest, in no way affected their rights in the Berkeley property. Even if we assume that the other partners were aware at that time that the land was partnership property, we cannot assume that they were aware of that legal effect of the deed of trust which Gilmer now argues. May it suffice to say that the authority of one partner to act for all will not be implied as to transfers of property not within the scope of firm business, and not for firm purposes. 2 *Rowley on Partnerships* §45.3-B (2)(a) (1960).

While the trustee's argument that the deed of trust was ineffective as an assignment of Decker's interest in specific partnership property is valid, it does not necessarily follow that the assignment was wholly without effect. Section 26 of the Uniform Partnership Act, Va. Code Ann. §50-26, provides that a "partner's interest in the partnership is his share of the profits and surplus, and the same is personal property." This partnership interest is assignable irrespective of the consent of the other partners. Va. Code Ann. §50-27(1).

Hence, the question is whether an ineffective assignment of a partner's interest in specific partnership property may be valid as an assignment of his partnership interest. The trustee relies on *Windom National Bank v. Klein*, 191 Minn. 447, 254 N.W. 602, 604 (1934), for the proposition that the purpose of section 25(b)(2) is to prevent an assignment of a partner's interest in specific partnership property, and "the only way, therefore, to apply it according to its terms is to nullify all attempts at such assignments. The law is that they were void.

. . ." However, the court in *Windom National Bank v. Klien* expressly left open the question here presented. The trustee also quotes an article by William Draper Lewis, a draftsman of the Uniform Partnership Act: "In other words, a partner may assign partnership property for a partnership purpose, but if he attempts to assign the property for his own purposes he makes no assignment at all, because the act destroys the quality of assignability for any but a partnership purpose." Lewis, *The Uniform Partnership Act*, 24 Yale L.J. 617, 634 (1918).

This statement of the law is correct as far as it goes, but Dean Lewis qualified the statement with his comments in Commissioners Note, 7 *Uniform Laws Anno.* 147 (1949):

> Of course, an attempted assignment of all the partnership property, void as an assignment of the rights of either of the partners in the property, or an attempted assignment by one partner of his rights in all the partnership property, may be regarded as a valid assignment of the partner's interest in the partnership.

It has been so regarded in the following cases, decided under the Uniform Partnership Act: *Shapiro v. United States*, 83 F. Supp. 375 (D.C. Minn.) *aff'd* 178 F.2d 439 (8th Cir. 1949); *Valley Springs Holding Corp. v. Carlson*, 56 S.D. 163, 227 N.W. 841 (1929).

The rationale of the *Shapiro* case is apposite: Where an assignment is not clearly intended to convey a partner's interest in specific partnership property, that is, his right to use partnership property for partnership purposes, but is intended to convey some interest in partnership property, the fact that the parties did not couch their assignment in proper terms does not justify a court's holding their transaction void when there exists evidence

establishing a basis upon which the transaction can be consistent and valid. 83 F. Supp. at 377.

The fourth paragraph of the March 27, 1961, deed of trust attempted to "grant, bargain, sell and convey. . . the following land . . . ." namely, "All interest acquired by Sterling R. Decker in 110.68 [acres of land]. . . ." The court can only conclude that Decker intended to convey in trust all the interest in this land which he had the power to convey. The land being partnership property, all the interest in regard to this land which Decker could assign without the consent of all the partners was his interest in the partnership—his right to his share of the profits, and the surplus, if any, after the partnership affairs have been settled. Va. Code Ann. §50-26 (1950). This result is consistent with the subsequent dealings among the bank, Gilmer and Decker. Decker's share of the partnership profits were to be derived from his resale of lots to purchasers. Under the financial plan devised at the time of the deed of trust was executed, the proceeds of these sales were placed in the "reserve" account, under the control of the bank and Gilmer. The fact that the deed of trust did not purport to assign Decker's partnership interest is not material. The intent of the parties is the controlling factor, and if a person may make an equitable assignment of a chose in action by words alone, a deed signed, sealed, delivered, acknowledged and recorded, should likewise suffice. See *Tatum v. Ballard*, 94 Va. 370, 26 S.E. 871 (1897); see also 2 *Michie's Jurisprudence*, Assignments §19 (1948).

Nor can it be said that any purpose of section 25(2)(b) would be frustrated by construing the deed of trust as an assignment of Decker's partnership interest. The primary reasons for the nonassignability of a partner's right in specific partnership property, discussed in the Commissioner Note, 7 *Uniform Laws Annotated*, Partner-

ship pp. 144-50 (1949), and summarized in *Goldberg v. Goldberg,* 375 Pa. 70, 99 A.2d 474 (1953), are that it prevents interference by outsiders in partnership affairs, it protects the rights of other partners and partnership creditors to have partnership assets applied to the firm debts, and that it is often impossible to value a partner's beneficial interest in a particular partnership asset. None of these reasons apply in this instance. Neither Decker's creditors nor the Berkeley partnership's creditors have grounds to complain. Decker himself would not be permitted to repudiate this solemn instrument, and the trustee, standing in his shoes, is in no better position.

Our holding that the March 27, 1961, deed of trust was valid as an assignment of Decker's individual and partnership interests in the Berkeley land does not require us to find contrary to the finding of the initial referee that the deed of trust was given for fair consideration within the meaning of §67(d) of the Bankruptcy Act. Although we are not bound by this finding of the referee, since neither he nor the Fourth Circuit, when it accepted this finding, had the benefit of the holding of the Virginia court that a partnership existed, the fact that the deed of trust conveyed Decker's partnership interest does not make the amount of Decker's debts ". . . disproportionately small as compared with the value of the property . . . obtained." Bankruptcy Act §67 (d)(1)(e)(2), 11 U.S.C. §107 (d)(1)(e)(2). Decker's partnership interest at the time of the execution of the deed of trust, and as revealed by subsequent events, cannot be valued greater than the value of an undivided one-half interest in the land. The value of Decker's partnership interest depended primarily upon his ability to raise the capital necessary to develop the property and to buy out the interest of the other partners in the land, as well as his success in selling the lots. From the standpoint of

the bank and Gilmer, an undivided one-half interest in the land, a more liquid asset, would have been more desirable as security. We hold that the March 27, 1961, deed of trust was given for fair consideration.

The trustee's final assault on the March 27, 1961, deed of trust is based upon the attorney-client relationship between Decker and Gilmer at the time the deed of trust was executed. The trustee claims that Gilmer took advantage of his relationship with Decker in securing the benefit of the deed of trust. Although Decker himself has made no such assertion, the trustee relies on section 70(e) of the Bankruptcy Act, 11 U.S.C. §110(e), and argues that since he represents the creditors of Decker in this proceeding, and since the deed of trust is fraudulent under Virginia law, it is void against the trustee. It seems the trustee's reliance on section 70(e) is misplaced since that section requires that the transfer, in order to be avoided by the trustee, be "fraudulent as against or voidable for any other reason by any creditor of the debtor." Assuming that Gilmer imposed on Decker in securing the deed of trust, no creditor of Decker would have standing to attack the transfer for that fact alone, since if the transfer was fraudulent and at all on this ground, it was fraudulent only as against Decker, or those in privity with him.

However, section 70(a)(5), 11 U.S.C. §110(a)(5), gives the trustee "the title of the bankrupt as of the date of filing of the petition initiating a proceeding under this title. . . to all of the following kinds of property wherever located. . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred. . .; (6) rights of action arising upon contracts, . . . or the unlawful taking or detention of or injury to his property. . ." It seems that a right of action against an attorney for abuse of the attorney-

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client relationship would vest in the trustee in bankruptcy of the client under either subsection (5) or (6). See *Collier on Bankruptcy* para. 70.28 pp. 405-13 (14th Ed. 1967). However, it is not necessary to pinpoint the source of the trustee's right, since we do not agree that Gilmer abused his influence in his dealings with Decker.

The standard of rectitude of an attorney is ably set forth in a leading Virginia decision, *Thomas v. Turner's Adm'r.* 87 Va. 1, 12 S.E. 149 (1890), which states:

> ". . . all dealings between attorney and client for the benefit of the former, are not only regarded with jealousy and closely scrutinized, but they are presumptively invalid, on the grounds of constructive fraud, and that presumption can be overcome only by the clearest and most satisfactory evidence. 87 Va. at 12.

[The burden is on the attorney to show:]

> . . . not only that no undue influence was used, or advantage taken, but that he gave his client all the information and advice as against himself that was necessary to enable him to act understandingly. He must show, in other words, (1) that the transaction was perfectly fair; (2) that it was entered into by the client freely; and (3) that it was entered into *with such a full understanding of the nature and extent of his rights* as to enable the client to thoroughly comprehend the scope and effect of it. 87 Va. at 13.

A review of the record reveals the following facts: Gilmer had been Decker's attorney and close personal friend for several years prior to March, 1961. As of March 27, 1961 Decker owed the bank over $249,000 on his notes endorsed by Gilmer, for which service Gilmer had charged a fee at a rate of 6 percent per annum based on the face amount of the notes. Both this court and the Fourth Circuit Court of Appeals have previously ruled that these endorsement fees were lawful. The idea of the

March 27, 1961, deed of trust originated with Mr. Adams of the bank. According to the testimony of Decker, Gilmer and Adams, Decker clearly understood the import of the March 27, 1961, deed of trust and cooperated willingly with Gilmer in its execution. The deed of trust was given for fair consideration. The financial plan arranged by Gilmer, Adams, and Decker, including the March 27, 1961, deed of trust, did not materially curtail Decker's business activities, and in fact Decker has testified that it helped him. Decker has at no time indicated that the deed of trust was detrimental to his interests. Upon Decker's default, Gilmer was required to pay to the bank over $247,000 on Decker's notes secured by the deed of trust.

This court concludes that the March 27, 1961, deed of trust, at the time of its execution, benefited Decker as much or more than it did Gilmer. The deed of trust enabled the bank to postpone its collection of Decker's notes, and permitted Decker to continue his business activities. Although Decker testified in 1964 that he may not have agreed to the deed of trust were it not for his close relationship with Gilmer, his testimony is quite consistent with the idea that Decker was confident at the time that Gilmer, as his attorney and friend, could be trusted to look after Decker's interests. While Gilmer's influence was a factor in Decker's agreeing to the deed of trust, it cannot be concluded from the evidence that Gilmer's influence was *undue*. Hence, the trustee's contention in this regard is unfounded.

Order of August 23, 1968

Turning to the referee's order of August 23, 1968, the court is asked to reverse the referee's holding that the two supplemental deeds of trust are void as fraudulent conveyances under §67(d)(2)(a), (b), (c) and (d) of

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the Bankruptcy Act, 11 U.S.C. §107(d)(2)(a), (b), (c) and (d). The first deed of trust, dated June 3, 1961, and recorded June 7, 1961, conveyed in trust a one-half interest in fifteen lots of the Berkeley subdivision. The second deed of trust, dated July 26, 1961, and recorded August 4, 1961, conveyed a one-half interest in an additional twelve lots. Both deeds recite that they are given solely as additional security for the $260,000 demand bearer bond of March 27, 1961.

An essential element of the fraudulent transfers described in subparagraphs (a), (b) and (c) of §67(d)(2) is that the transfer was made without "fair consideration", a term which, for our purpose, is defined in §67(d)(1)(e)(2): "When such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained." The referee invalidated these two deeds of trust because in his opinion this element of fair consideration was lacking.

This conclusion of the referee is based upon the following additional findings of fact and reasoning. At the time the March 27, 1961, deed of trust was executed neither the bank nor Gilmer indicated that additional capital would be made available to the bankrupts to further their activities in the Berkeley project. At that time the Gilmer-endorsed notes made by Decker totaled $249,199.31. These notes were secured by the $260,000 bond, which in turn was secured by the March 27, 1961, deed of trust. The value of the real estate which this deed of trust attempted to convey was approximately $344,000. The monies deposited in the "reserve" and "escrow" accounts arose from loans by the bank upon interim financing arranged by purchasers of lots upon which dwellings were to be constructed by the bankrupts. This financing was

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evidenced solely by the obligations of the purchasers of lots and was secured by vendor's liens pending the completion of construction of the dwellings and execution of the deeds of trust for the permanent financing. No additional capital or credit was extended the bankrupts by either Gilmer or the bank at or subsequent to the execution of either of the two subsequent deeds of trust.[2] On November 15, 1961, when Gilmer was required to pay the bankrupts' notes, his endorsers liability totaled $247,275.

The referee reasons that since ". . . the amount of the antecedent primary debts of Decker which [the March 27, 1961] said deed of trust was given to secure was not disproportionately small as compared with the value of the property transferred in trust," *Gilmer v. Woodson*, supra, 332 F.2d at 545, it follows that the debt was fully secured, and therefore "could not furnish consideration for the two supplemental deeds of trust."

Accepting the facts substantially as found by the referee, the court cannot agree with his conclusion of law. The question is whether the combined value of the property conveyed by the three deeds of trust, less the value of the property released as security, is disproportionate as compared with the amount of the antecedent debts.

The facts, stated simply, are as follows: The value of the property conveyed as security by the March 27, 1961, deed of trust was roughly, $344,000. The amount of the primary debts of the bankrupts on that date was approximately $249,000. The court does not consider this

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2. Although not essential to this decision, the court cannot agree with this conclusion. As noted in *Gilmer v. Woodson*, 332 F.2d at 547-8, Decker borrowed $16,000 from the bank on Gilmer's endorsement. This loan was made on July 13, 1961, was among the notes which Gilmer paid on November 15, 1961, and would fall under the security of the March 27, 1961, bond and deed of trust and subsequent deeds of trust.

disparity, under the facts of this case, to be disproportionate within the meaning of §67(d)(1)(e)(2). See *Epstein v. Goldstein,* 107 F.2d 755 (2nd Cir. 1939); *Troll v. Chase National Bank,* 257 F.2d 825 (2nd Cir. 1958); *Bianco v. Lay,* 313 Mass. 444, 48 N.E.2d 36 (1943). During the spring and summer of 1961 about twenty-four [3] of the Berkeley lots were sold by Decker to purchasers. We may assume for our purposes that the average value of Berkeley lots was about $3,000. Proceeds of these sales, totaling $76,000, were deposited in the "reserve" account, in which fund the bank and Gilmer had a security interest. In other words, $76,000 of property was released from the March 27, 1961, deed of trust and replaced by $76,000 in cash held as security in the reserve account. Of this $76,000, about $20,000 was used to pay the interest and principle owing on the notes of the bankrupts. Another $16,000 of this fund went toward the purchase of the one-half interest of Decker's partners in additional Berkeley lots. The remaining $40,000 was released from the "reserve" account to pay some of Decker's creditors. For the purpose of maintaining the ratio of the debt to the value of the property given as security, a one-half interest in twenty-seven lots purchased by Decker from the other partners was given as security under the two subsequent deeds of trust. A one-half interest in twenty-seven lots, average value per lot being $3,000, would be worth about $40,500. The net effect of these transactions is that the value of the property released from the March 27, 1961, deed of trust was replaced by the equivalent value of the land conveyed under the two subsequent deeds of trust, while the amount of the antecedent debts remained relatively con-

3. Although Decker's testimony refers to 30 lot sales, the list of charges and deposits to the "reserve" account reveals that the proceeds of no more than 24 lot sales were deposited in that account.

stant—$249,000 in March 1961, and $247,000 in November 1961.

While the above figures are admittedly approximations, they are sufficiently close as not to materially alter the legal effect. Although the form of the security changed, its value in relation to the amount of the debts did not. It follows that if the ratio of debt to value of security was not disproportionate under the March 27, 1961, deed of trust, as we have held, a similar conclusion is required with regard to the two subsequent deeds of trust.

There remains for our review the finding of the referee that the two subsequent deeds of trust were given by Decker with actual intent to hinder, delay or defraud creditors within the meaning of §67(d)(2)(d). The court is referred to nothing in the record to support this conclusion, and, indeed, a perusal of the entire record reveals no evidence of fraudulent intent on the part of Decker. The transcript of testimony does disclose that Decker used the deeds of trust to ward off creditors who threatened to file suit. Decker testified that on one occasion that March 27, 1961, deed of trust was shown to an Internal Revenue agent in order to discourage the filing of a tax lien. Also, the "reserve" account was used to appease those creditors who threatened to sue if they were not paid. However, these acts alone do not permit a finding of actual intent to hinder, delay or defraud creditors. "For it is well settled law that a conveyance made in good faith, whether for an antecedent or a present consideration, is not forbidden . . . notwithstanding that the effect may be that it hinders or delays creditors by removing from their reach assets of the debtor." *Coder v. Arts*, 213 U.S. 223, 243, 29 S.Ct. 436 (1909); See 4 *Collier on Bankruptcy*, para. 67.37, p. 534 (14th Ed. 1967). The testimony of Decker, Gilmer, and Adams

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is consistent throughout. The purpose of the March 27, 1961, deed of trust and the financial plan was to put Decker back on his feet and enable him to get out from under his debts. Nowhere does it appear that bankruptcy was contemplated at the time the deeds of trust were executed, and a finding of bad faith on the part of Decker or Gilmer is not justified in the record. See *Dean v. Davis*, 242 U.S. 438, 37 S.Ct. 130 (1916); *Shay v. Gagne*, 275 Mass. 386, 176 N.E. 200 (1931). While the intent of Decker to prefer Gilmer to his other creditors would be an important factor to consider in determining whether an intent to defraud also exists, an intent to prefer, without more—such as the violation of express provisions of a statute—is not a fraudulent intent. See *Van Iderstine v. National Discount Company*, 227 U.S. 575, 33 S.Ct. 343 (1913). The law of Virginia does not differ on this point. *Temple v. Jones, Son & Co.*, 179 Va. 286, 19 S.E.2d 57 (1942); see 9 *Michie's Jurisprudence*, Fraudulent and Voluntary Conveyances §41 (1950). Decker's preferences violated no provision of the Bankruptcy Act, and hence he could rightfully wave the deed in the face of his creditors to keep them at bay.

What we have said as to the bankrupt's intent also disposes of the question of whether Gilmer or the bank acted in good faith in taking the benefit of the deeds of trust. Good faith cannot be said to be lacking unless the transferee knowingly participated in the debtor-transferor's purpose to defeat other creditors or lacked good faith in valuing the property exchanged. *Gilmer v. Woodson*, supra, 332 F.2d at 541. We find no evidence that Gilmer lacked good faith in valuing the property. Hence the element of fair consideration for the two subsequent deeds of trust was not lacking.

Accordingly, it is the opinion and judgment of this court that the findings of fact and conclusions of law

embodied in the referee's orders of September 11, 1968, to the extent not modified by this opinion, are hereby adopted and affirmed; the order of August 23, 1968, is hereby reversed. It is our opinion that the March 27, 1961, deed of trust, and the two supplemental deeds of trust are valid.

The Clerk of this court is directed to send copies of this opinion and judgment to counsel of record and to the referee.

ENTER:

/s/ TED DALTON
U. S. District Judge
January 6, 1969

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE, VIRGINIA

In the matter of:

Sterling R. Decker and Mary Jane Decker, Partners, t/a Berkeley Community Builders,

Bankrupts.

In Bankruptcy
No. 707

At Charlottesville, in said District, this 23rd day of August, 1968.

This opinion and order deals with two additional supplemental deeds of trust made by the bankrupts to further secure their $260,000.00 bearer bond dated March 27, 1961, which is secured by a deed of trust of even date upon virtuously all of their then owned real estate.

The first of these supplemental deeds of trust was made by the bankrupts Sterling R. and Mary Jane Decker to Richard H. Barrick and George Gilmer, trustees, dated June 3, 1961. It conveyed a one-half interest in 15 designated lots in the Berkeley Subdivision in trust solely for the additional security of the bankrupts' deed of trust bond for $260,000.00 dated March 27, 1961.

The second of these supplemental deeds of trust was likewise made by the said bankrupts to Richard H. Barrick and Downing L. Smith, trustees, dated July 26, 1961. It conveyed a one-half interest in 12 designated lots in the Berkeley Subdivision in trust solely for the additional security of the bankrupts deed of trust bond

for $260,000.00 dated March 27, 1961. The $260,000.00 deed of trust dated March 27, 1961 and two other like supplemental deeds of trust were the subject of an appeal to the United States Court of Appeals for the Fourth Circuit. This case is now upon remand and the validity of the subject two supplemental deeds of trust is one of the disputed matters to be settled by further proceedings consistent with the opinion of the Court of Appeals under its mandate. *Gilmer* v. *Woodson*, Trustees in bankruptcy, 332 Federal 2nd 541 (1964). Consequently, the opinion of the Court of Appeals should be reviewed as it relates to the issues now presented.

In its opinion the Court of Appeals found that the record supported the findings of fact made by the referee and set forth in fifty-three enumerated paragraphs upon certifying matters for review. In particular, the Court of Appeals affirmed the following findings of fact which significantly bear upon the questions presented:

> The bankrupts were adjudicated January 12. 1962. (Finding of fact No. 1.)
>
> The bankrupts were insolvent as of March 27. 1961. (Finding of fact No. 39.) Real estate owned by the bankrupts on March 27, 1961 was worth approximately $344,000.00. (Finding of fact No. 17.)
>
> By the deed of trust executed March 27, 1961 the bankrupts conveyed virtually all of the real estate owned by them to secure their bond for $260,000.00. (Finding of fact No. 14.)
>
> Concurrent with the execution of the deed of trust of March 27, 1961 the Peoples National Bank and Gilmer, with the consent and agreement of the bankrupts, established a "Reserve Account" under the exclusive control of the Bank and to which the proceeds for lots owned and sold by the bankrupts were deposited (Finding of fact Nos. 23 & 24.) and also established an "Escrow Account" under the exclusive control of Gilmer and to which was deposited the contract price for dwellings to be constructed by

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the bankrupts for purchasers of lots. (Finding of fact Nos. 25 & 26.)

The liability of Gilmer to the bank upon his endorsement of the notes of the bankrupts was called, or liquidated, in the aggregate amount of $247,275.00, and thereupon Gilmer became the holder of the bankrupts' deed of trust bond for $260,000.00. (Finding of fact No. 30.)

Claims of creditors exceeding $313,500.00, exclusive of the debt of $249,199.31 held by Gilmer and secured by the $260,000.00 deed of trust are filed in these proceedings. (Finding of fact No. 37.)

The Court of Appeals affirmed the findings of fact by the referee that the deed of trust dated March 27, 1961, was given to secure an antecedent debt in an amount not disproportionately small as compared to the value of the property conveyed in trust and that the bankrupts had no intention to hinder, delay or defraud other creditors in making the $260,000.00 deed of trust for the security of an antecedent debt of $249,199.31. Thereupon, it was determined that Gilmer cannot be held to have lacked good faith with respect to valuing either the debt or security obtained. In its opinion, the Court of Appeals succinctly reviewed the financing plan adopted at the time the $260,000.00 deed of trust was executed. The opinion states the $260,000.00 bond was drawn in an amount in excess of the then aggregate amount of the bankrupts' notes endorsed by Gilmer to enable the bank to subsequently lend more money to Decker under the new financing plan and bring these loans under the security thus afforded. The Court of Appeals further determined that the two supplemental deeds of trust, executed by the bankrupts subsequent to their execution of the two supplemental deeds of trust here in question, constituted voidable preferences and the fact that Gilmer had voluntarily relinquished an even better position earlier was

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wholly immaterial. The trustee of the bankrupts has charged that the two supplemental deeds of trust now under consideration are null and void pursuant to Sections 67d (2) (a), (b), (c) and/or (d) of the Bankruptcy Act. He alleges they were each executed and received with actual intent to hinder, delay or defraud both existing and future creditors. Gilmer's answer to the charge of the trustee alleges these two supplemental deeds of trust were given in the regular course of business according to the financial plan reviewed with approval by the Court of Appeals. He states the one-half interest in the designated lots conveyed by these supplemental deeds of trust was purchased with the bankrupts' funds held in the "Reserve Account" and were relinquished to further the financing plan for the bankrupts' activities in Berkeley; that the supplemental deeds of trust were an integral part of the plan; and that by analogy the Court of Appeals has approved these trusts. Consistent with the opinion of the Court of Appeals the evidence relating to the financing plan adopted March 27, 1961 has been reviewed in more detail. Particularly the evidence taken since the remand of the case has been carefully read. From the evidence in the case the following additional findings of fact relating to the financing plan and these two supplemental deeds of trust are made:

> Upon execution of the $260,000.00 deed of trust dated March 27, 1961 there was no indication by the bank or Gilmer that additional capital would be made available to the bankrupts for their activities in the Berkeley project.
>
> That it was the intention of the bankrupt Sterling R. Decker by execution of the $260,000.00 deed of trust to give Gilmer security for his endorser's liability.
>
> The monies deposited to both the "Reserve" and

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"Escrow" Accounts largely arose from loans by the bank upon interim financing arranged by purchasers of lots upon which dwellings were to be constructed by the bankrupts. Such financing was evidenced solely by the obligations of the purchasers of lots and was secured by vendors' liens pending the completion of construction of the dwellings and execution of the deeds of trust for the permanent financing.

No additional capital or credit was extended the bankrupts by either Gilmer or the bank at or subsequent to the execution of either of the two subject supplemental deeds of trust.

CONCLUSIONS OF LAW

There appears no conflict in the testimony of the bankrupts, Gilmer or the bank concerning details of the financing plan agreed upon and put into effect upon execution of the $260,000.00 deed of trust dated March 27, 1961. Although the opinion of the Court of Appeals states that after the new financing plan went into effect there was a flurry of activity and it appeared that the Berkeley project was back on the road to success and that several new houses were sold, others were constructed and sold under financially profitable arrangements, and progress was made in paying claims of various creditors, it does not appear this progress was realized as a consequence of the new financing plan. Sterling R. Decker, bankrupt testified to the contrary. He testified that the sale of some thirty houses occurred because it was the Spring of the year, which is the time that new dwellings are sold. Further Decker testified that the funds used to construct those houses were the result of construction loans made to the buyers and deposited in the "Escrow Account". (TR 9/24/64, p. 96-97.) The chief contribution made by Gilmer and the bank to the building and sales activities in the Berkeley Subdivision during the

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Spring of 1961 seems to have been that the bank extended credit to purchasers and it and Gilmer deferred enforcing collection of the defaulted notes of the bankrupts. This deferment was undoubtedly due to the security received and the fact that through the new financing plan the services of Decker were retained to promote and conduct the continued development of properties in the Berkeley project. Decker alone sold the lots and sold the contracts for construction of dwellings. These sales by Decker introduced the new lines of credit offered by the purchasers. This permitted a liquidation of Berkeley lots and the prospect of construction profits without either the bank or Gilmer assuming any additional risk from Decker's venture. It also provided Gilmer and his associate owners of one-half interest in certain lots an opportunity to sell that undivided interest to Decker on favorable terms. Although Gilmer and the bank have complained that the bankruptcy of Decker resulted from the diversion of his interest from the Berkeley project, yet, the financing plan made no provision for the barest livelihood to Decker and his family. On the contrary the plan captured the entire sales proceeds for land owned and sold by Decker and the entire profits, if any, realized under the construction contracts performed by Decker. While it is true the purpose of the plan was, in part, to gain control over Sterling R. Decker's activities, it is also true that he had little or no choice in executing the $260,000.00 deed of trust and agreeing to the financial plan. (TR 9/24/64, pp. 116, 122.) On the whole it would appear the evidence leads one to believe that the cost of credit extended to Decker imposed an insurmountable burden upon him and the Berkeley project. My review of the evidence fails to disclose that a single additional dollar of credit was extended or a single dollar in money was released to Decker for his necessary livelihood by

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either Gilmer or the bank after the financing plan was imposed upon him. There is no evidence of any new consideration passing from either Gilmer or the bank to Decker to support either of these two supplemental deeds of trust. The Court of Appeals affirmed the finding of the referee that the deed of trust was given to secure an antecedent debt in an amount *not* disproportionately small as compared to the value of the property conveyed in the trust. That is, $260,000.00 of property was conveyed upon trust to secure $249,199.31. In a word the $260,000.00 lien was full security for the debt. If this be true, then that debt was fully secured and could not furnish consideration for the two supplemental deeds of trust. Each of the supplemental deeds of trust expressly provides the conveyance is made in trust solely for the additional security of the $260,000.00 bond. Consequently that bond, which was fully secured, could offer no consideration for either of these supplemental deeds of trust. Even had this restrictive provision not been incorporated within each of the supplemental deeds of trust, there was no new money loaned or credit extended to the bankrupts as a consideration to support either of these supplemental deeds of trust. Each of these supplemental deeds of trust was made by the bankrupts within one year prior to the filing of the petition initiating this proceeding without fair consideration by the bankrupts who were then insolvent. Further these two supplemental deeds of trust were made by the bankrupts without fair consideration while engaged in business, for which the property remaining in the hands of the bankrupts was an unreasonably small capital. Further still, these two supplemental deeds of trust were made by the bankrupts without fair consideration with the intention to incur or the belief that the bankrupts would incur debts beyond their ability to pay as they matured. Finally these two

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supplemental deeds of trust were made by the bankrupts with the actual intent to hinder, delay or defraud either existing or future creditors.

Accordingly, it is

ORDERED:

That the aforesaid supplemental deed of trust made by Sterling R. Decker and Mary Jane Decker, bankrupts, to Richard H. Barrick and George Gilmer, trustees, dated June 3rd, 1961, recorded June 7, 1961 in the Clerk's Office of Albemarle Circuit Court and the supplemental deed of trust made by the said bankrupts to Richard H. Barrick and Downing L. Smith, trustees, dated July 26, 1961 and recorded in the said clerk's office August 4, 1961 be and the same each is held and declared to be null and void for want, or failure, of consideration valuable in law to support the same and the same each is held and declared to be fraudulent under Section 67d (2) (a), (b), (c) and (d) of the Bankruptcy Act, 11 U. S. C. A. Sec. 107 (d) (2) (a), (b), (c) and (d).

Copies of this order are directed to be mailed to Robert M. Musselman, Esq., counsel for B. B. Woodson, trustee in bankruptcy, and Carl Hennrich, Esq., counsel for George Gilmer, Esq.

PHILIP H. HICKSON
Referee in Bankruptcy

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APPENDIX E

THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE, VIRGINIA

In the matter of:
Sterling R. Decker and
Mary Jane Decker
Bankrupts.

In Bankruptcy
No. 707

At Charlottesville, in said District, this 11th day of September, 1968.

June 26, 1967 order was entered herein making a determination of the issues raised by the trustee of the bankrupts attacking the validity of the deed of trust executed by the bankrupts March 27, 1961 to secure their bearer bond for $260,000.00. By that order it was determined, consistent with the opinion of the United States Court of Appeals in *Gilmer v. Woodson, trustee,* 332 F. 2d 541, that the said deed of trust is valid. The trustee duly filed his petition for review of the order of June 26, 1967. The trustee also filed his petition for reopening, reconsideration, oral argument and review of the order of June 26, 1967. The petition for reconsideration of the order was granted and, after additional extensive pleadings were filed, oral argument was heard. In the light of the further pleadings and arguments the validity of the $260,000.00 deed of trust dated March 27, 1961, has been reconsidered.

The order of the referee entered June 26, 1967 refers to two petitions filed by the trustee December 21, 1966

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and marked "A" and "B and C." These petitions separate the issues for determination. Petition "A" concerns two issues, the first of these is that the Uniform Partnership Act as enacted and effective in the Commonwealth of Virginia provides that a partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all partners. It alleges the deed of trust dated March 27, 1961 to secure the $260,000.00 bond is invalid as being the assignment by a partner, Sterling R. Decker, of his partner's interest in specific partnership property.*

It is strenuously argued by the trustee of the bankrupt that the attempted assignment by Sterling R. Decker, by deed of trust dated March 27, 1961, of his interest in specific partnership property is wholly ineffective because it is forbidden by state statute. The trustee contends the U. P. A. nullifies the March 27th, 1961 deed of trust and that he, as trustee of the bankrupt, is vested by operation of law with the interest of the bankrupt in the Berkeley Partners partnership.

The question of law raised by this issue has been ably briefed and argued by counsel. It would add little or nothing to the record to incorporate a lengthy law opinion. As a basis for determination of the issue presented a review is made of significant facts and circumstances. The opinion of the Court of Appeals mentions the source by which Sterling R. Decker, bankrupt, acquired his in-

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* Code of Virginia (1950), Section 50-25 (2). "The incidents of his tenancy are such that: "(a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

"(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property."

terest in the tract of land known as "Berkeley", the remaining part of which interest he undertook to convey by the deed of trust dated March 27, 1961. Copy of the deed by which Sterling R. Decker acquired his interest in the Berkeley property has not been found in the record. However, in numerous places the record refers to the deed made by W. Hallam Tuck to Sterling R. Decker and Charles William Hurt, dated December 24, 1956, of record in the Clerk's office of the Circuit Court of Albemarle County, Virginia in Deed Book 230, p. 244. This deed conveyed the Berkeley real property to the grantees jointly. After development of the Berkeley Subdivision had commenced, on April 26, 1957 an agreement was entered into between Sterling R. Decker, party of the first part, and Charles W. Hurt, George Gilmer and George Gilmer, Jr., parties of the second part, and by endorsement David J. Wood, Jr. and Joseph M. Wood, II became parties to the agreement. Under the agreement of April 26, 1957 the Gilmers and Woods acquired the interest of Charles W. Hurt in the Berkeley property. Concerning an essential provision of the agreement of April 26, 1957, the Court of Appeals pointed out that it gives "Decker an option to purchase the interest of the others in the lots in Berkeley at a certain fixed price and providing that Decker alone would develop Berkeley as a residential area." The development of the subdivision continued and a large number of deeds, said to be ninety, were made conveying lots to purchasers. These deeds were executed only by Sterling R. Decker and his wife as he had acquired the interest of the other joint owners or parties in the lots sold by exercise of the option given him under the agreement of April 26, 1957.

March 27, 1961 the $260,000.00 deed of trust was executed by the bankrupts. This deed of trust followed the

pattern of the agreement of April 26, 1957 in that it described the interest of the grantors as one half undivided interest in the unsold Berkeley property.

December 11, 1961 Gilmer and two other creditors (not parties to the agreement of April 26, 1957) filed a petition for the involuntary adjudication of Sterling R. Decker and Mary Jane Decker, parties trading as Berkeley community builders, to be adjudged bankrupt. Thereupon Sterling R. Decker filed a bill of complaint against the other parties to the agreement of April 26, 1957, being George Gilmer, George Gilmer, Jr., David Wood and Joseph M. Wood, II alleging that a partnership existed between him and the said defendants; that George Gilmer and others had instituted involuntary bankruptcy proceedings against him; and that if he was adjudicated a bankrupt the partnership would be dissolved automatically under Section 50-31 of the Virginia Code. The bill prayed that the court determine a partnership existed; that the bankruptcy proceeding constituted a dissolution of the partnership and that the court direct the winding up of the partnership affairs. The Corporation Court of the City of Charlottesville decided no partnership existed. The trustee of the bankrupt appealed and the Virginia Supreme Court determined that a partnership did exist and the cause was remanded with direction to wind up its affairs. *Woodson, Trustee* v. *Gilmer,* 205 Va. 487, 137 S.E. 2d 891. The state court suit having been instituted by the bankrupt and his trustee having joined therein and prosecuted the appeal to the Virginia Supreme Court, it was decided that principles of comity and full faith required that the State court should proceed to liquidate the partnership property, free of liens, and deliver to the trustee in bankruptcy the interest of Sterling R. Decker therein, impressed with the lien of the deed of trust dated March 27, 1961 if deter-

mined valid in the bankruptcy proceeding. In this manner the liquidation of the two estates and the determination of the separate issues raised therein are proceeding simultaneously.

Upon this factual background the issue raised should be considered. It is significant that in neither this bankruptcy proceeding nor the cause pending in the State Court has any partnership creditor or partner of Sterling R. Decker objected to or otherwise opposed the deed of trust made by him March 27, 1961. Nor has any of his partners questioned the validity of the deeds made by Sterling R. Decker and Mary Jane Decker his wife, conveying lots in the Berkeley Subdivision to purchasers. The partnership formed between Decker, the Gilmers and the Woods by the agreement of April 26, 1957 is solvent. In fact it has no substantial indebtedness and will be faced with nothing more than the administrative expense of the procedure for winding up the partnership affairs. The rights of no creditor of the partnership was or will be affected by the bankrupts' deed of trust dated March 27, 1961. The trustee asserts by operation of law he succeeded to the partnership interest of Decker. The question is whether the trustee of the bankrupt may enlarge for the bankruptcy estate the interest of the bankrupt in the partnership property by repudiating his deed of trust dated March 27, 1961. Sterling R. Decker, bankrupt, has nowhere in his testimony repudiated his deed of trust. It has been held that such a deed of trust is effective to convey to a mortgagee or vendee the surplus, if any, after the partnership business has been settled. *Malvern National Bank* v. *Halliday,* 195 Iowa 734, 192 N.W. 843, 847; 68 CJ second 2d, Section 155, p. 596. It has also been held that the sale by one partner of his one-fourth interest in an apartment building owned by the partnership to another partner may be construed un-

der the U. P. A. as sale of part of a partnership interest and validated. *Shapiro* v. *U. S.*, D.C. Minn. 1949, 83 F. Supp. 375. In view of the fact that the Berkeley Partners partnership has no indebtedness of consequence the construction of the statute restricting assignment of a partner's interest in specific partnership property should be considered and construed as it affects the rights of the other partners. Under the facts of this case the consent of the other partners of Sterling R. Decker may be reasonably implied. This implication may be drawn from the fact that no partner has objected to the assignment by the deed of trust dated March 27, 1961. Further the consent and approval by the partners of Sterling R. Decker to his deed of trust of March 27, 1961 may be drawn from the agreement of April 26, 1957 by which all partners of Sterling R. Decker granted him both the option to acquire their interest in the Berkeley property and reposed in him the exclusive management and operation of the Berkeley land development. From that agreement it is apparent that it was the intention of all partners for Sterling R. Decker to exclusively conduct the land development for which they would contribute capital proportionately and as required. There was no intention for the partnership business to be conducted in the absence of Sterling R. Decker. Surely under such circumstances Decker would not be heard to repudiate his deed of trust, which it has been determined was executed for fair consideration. No more can Decker's trustee in bankruptcy, standing in his shoes, be heard to repudiate the deed of trust upon this technicality at the time the partnership is being wound up in a suit filed by the bankrupt.

It is compatible with the intention of the partners expressed in the agreement of April 26, 1957 and the state court proceeding for winding up the partnership's affairs to construe the deed of trust of March 27, 1961 as the

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assignment of $260,000.00 of the interest of Sterling R. Decker in the partnership.

The jurisdiction of the federal courts first attached to determine the validity of the deed of trust of March 27, 1961. That jurisdiction and determination of that issue has been retained in this federal court. Consequently the deed of trust has not adversely affected the conduct of the partnership business, as stated in the opinion of the Court of Appeals; it has not affected the rights of partnership creditors; and there has been no complaint by a partner that it breached his technical rights as partner. The deed of trust will not impede liquidation of partnership property in the proceeding for winding up partnership affairs. When the interest of the bankrupt in the partnership property is paid into this court in this proceeding it will be a sum of money belonging exclusively to this bankruptcy estate. Thereupon it devolves upon this court to make a just distribution of the fund according to principles of both law and equity. To allow the technical plea of the trustee to prevail would defeat the intention of parties to the instrument, constitute a repudiation of a solemn instrument by the party benefitted thereby and shock the sense of justice of this court. Accordingly the deed of trust is held voidable and not void under the facts and circumstances of this case and the plea is disallowed.

The next issue raised by the trustee in petition "A" is that the description of the real estate purported to be conveyed in item "Fourth" of the March 27, 1961 deed of trust is an inadequate description as a matter of law, and is vague, uncertain and ambiguous and wholly ineffective as a conveyance. Therefore the trustee contends that paragraph Fourth of the deed of trust dated March 27, 1961 is not binding upon him in these proceedings.*

* Deed of Trust made by Sterling R. Decker and Mary Jane Decker

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The former referee commented the description of the property in paragraph Fourth of the deed of trust of March 27, 1961 was sketchy. This is a fact. However upon a reading of the whole paragraph it appears sufficient to put one on notice of the property sought to be described and conveyed. The description is consistent with the description in both the deed from William Hallam Tuck, by which the Berkeley property was acquired, and the partnership agreement of April 26, 1957. The parties to the instrument unquestionably understand what property the grantors intended to convey by paragraph Fourth. Likewise the partners of Sterling R. Decker understand the description. While more may be desired by way of description by a stranger, yet, I have no doubt that if the references are followed and reasonable inquiry is made that the property sought to be described and conveyed by paragraph Fourth can be determined with certainty. Under Virginia law this is all that is required and I find the description adequate and disallow the plea. *Carter* v. *Harris*, 4 Rand. (25 Va.) 199;

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et al, dated March 27, 1961, to secure $260,000.00 bond, "FOURTH: All interest acquired by Sterling R. Decker in 110.68 in Albemarle County, Virginia, fronting on the west side of Route 29, north of Charlottesville, and the south side of State Route 631, except parts or interest conveyed all by deeds recorded before this date and the dedication of streets and easements for electric and telephone lines, and water and sewer pipes as shown on plats of record or in deeds of record. This includes a one-half interest in this land as conveyed to Sterling R. Decker by W. Hallam Tuck and wife by deed dated December 24, 1956, recorded in D. B. 330 p. 244, and a part of this is subject to deed of trust from Sterling R. Decker and others conveyed to Magruder Dent, Jr., and George Gilmer, Trustees, dated January 17, 1957, and recorded in D. B. 330 p. 245, reduced by payments of $15,087.50. The other half interest of parts has been conveyed to Sterling R. Decker by David J. Wood and others, by deeds of record in D. B. 337 p. 355, D. B. 340, p. 29, D. B. 340 p. 579, D. B. 343 p. 265, D. B. 345 p. 482, D. B. 347 p. 303, D. B. 350 p. 3, D. B. 355 p. 71, D. B. 357 p. 145, D. B. 360 p. 143, D. B. 360 p. 423, D. B. 360 p. 423, D. B. 363 p. 220 and D. B. 364 p. 78. Some of these lots are subject to deeds of trust."

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Munday v. *Vawter,* 3 Grat. (44 Va.) 518; *Smith* v. *Bailey,* (144 Va.) 757, 127 S.E. 89.

Trustee's petition "B and C" filed December 21, 1966 attacks the deed of trust dated March 27, 1961 as a fraudulent conveyance under Sections 67 d (2) (a), (b), (c) and/or (d) and/or Section 70 of the Bankruptcy Act. He further attacks the deed of trust because it was employed after its execution to hinder, delay or defraud creditors.

The order of the Referee entered June 26, 1967, which is now upon review, found that the additional evidence introduced since the remand of this case, either standing alone or considered with evidence previously taken, was insufficient to support a change of the facts previously found by the referee and approved by the courts. It would not now be sufficient to alter the determinations made by the Court of Appeals for counsel to make a different presentation of the same evidence or for the referee to consider the same evidence from a different viewpoint. There must be cogent evidence of mistake or miscarriage of justice to support a reversal of the findings of fact made by the referee and approved by the courts.

The evidence previously presented and considered by the courts upon appeal is substantially the same as evidence subsequently taken. The Court of Appeals has found that the consideration for the bond and the deed of trust was "fair." Consistent with the opinion of the Court of Appeals the attacks upon the deed of trust based on Section 67 d (2) (a), (b) and (c) are without merit, for the trustee must prove a failure of "fair" consideration to support the bond and deed of trust. Likewise, Section 67 d (2) (d) requires the Trustee establish that the deed of trust was made with actual intent on the part of the bankrupt to hinder, delay or defraud creditors. The opinion of the Court of Appeals has ap-

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proved the finding of fact by the referee that Decker had no intent to defraud his creditors or that the deed of trust was subsequently used for such fraudulent purpose. There is no new cogent evidence establishing this finding of fact was the result of mistake or miscarriage of justice.

Counsel for the trustee have rephrased the issues but in substance the evidence is the same considered by the court upon the appeal. Also, the issues upon appeal were in substance the same as now raised. Consequently, I am constrained to affirm my order entered herein June 26, 1967. I see no reason to make additional findings of fact beyond the factual statements made in this order.

It is

ORDERED:

That the order entered herein June 26, 1967 be affirmed and that order, together with the pleadings subsequently filed, will be certified pursuant to the petition for review heretofore filed by the trustee.

Copies of this order are directed to be mailed to Robert M. Musselman, Esq., 413 Seventh Street, N. E., Charlottesville, Virginia and Carl E. Hennrich, Esq., Court Square Building, Charlottesville, Virginia.

PHILIP H. HICKSON
Referee in Bankruptcy

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APPENDIX F

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE DIVISION

In the matter of:

Sterling R. Decker and
Sterling R. Decker & Mary Jane Decker,
Partners, t/a Berkeley Community Builders,
Bankrupts

In Bankruptcy Nos.
706 and 707

At Charlottesville, in said District, this 26th day of June, 1967.

The validity of the $260,000 deed of trust is the subject of this order. Since remand of the case concerning this deed of trust by the Court of Appeals for further proceedings not inconsistent with its opinion in *Gilmer v. Woodson, Trustee*, 332 F. 2d 541, it was decided that the mandate permitted the amendment of pleadings to present new issues and the introduction of new evidence relevant to the validity of this deed of trust. Because the matters in dispute involved a great complexity of record and a confused pattern of pleading arising from a great number of memoranda, petitions, motions, orders, reviews, appeals and other pleadings of record since the filing of this case and which tend to obscure and confuse the issues now properly to be determined, the trustee of the bankrupt filed on December 21, 1966, two petitions restating the principal issues to be resolved. With the petitions the trustee filed a memorandum which separates the issues into four groups, A to D. Sections A and B

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of the Memorandum state questions, or issues, relating to the validity of the $260,000 deed of trust. One petition, marked "A", and a substantial part of the other petition, marked "B and C," state the factual basis for the trustee's attack upon this deed of trust.

Mr. George Gilmer filed his answers and supporting memorandum to the Trustee's petitions.

These petitions and answers compose the pleadings of issues relating to the validity of the $260,000 deed of trust for determination under the remand mandate. Other issues raised by these pleadings are not now considered.

No new or further evidence was offered since the petitions and answers were filed. To large extent reliance is placed upon the evidence taken before the late Referee, to whom the case was initially referred, after the remand for further proceedings. The voluminous evidence of record in this proceeding, in large measure and particularly the evidence taken since the remand and that designated by counsel, has been read and considered. It is argued by the Trustee, in effect, that this additional evidence casts a new light on evidence previously taken and, coupled with the evidence introduced previous to the appeal, it requires a different decision as to the validity of the $260,000 deed of trust.

The additional evidence introduced since remand of the case tends only to amplify previous testimony. The opinion which restricts these proceedings on remand states that the Referee in certifying the record for review set forth, in fifty-three enumerated paragraphs, detailed findings of fact as to all of which, except three, there was no material disagreement between the parties. Both the District Court and Court of Appeals found there was substantial support in the record for the findings of fact made by the Referee. Upon remand the question is

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whether the additional evidence presented is so fundamental to a just determination of the matter at issue that it compels a reversal of the material facts previously found and sustained on review and appeal. To justify a change in those findings of fact, the opinion of the Court of Appeals states there must be "most cogent evidence of mistake or miscarriage of justice." I do not find the additional evidence introduced, either standing alone or considered with evidence previously taken, to be of the quality, nature or force to compel or require a change of facts previously found and approved. Upon those facts it was decided that the $260,000 deed of trust was not invalid. No new cogent evidence to the contrary having been presented, I must hold that this deed of trust is valid.

The issues now raised attacking the validity of this deed of trust were previously made and are decided by the opinion of the Court of Appeals or, as pointed out in the opinion of the District Judge in one particular, are not material and without merit.

Accordingly, it is

ORDERED:

That the said petition, marked "A", and the allegations of the said petition, marked "B and C", which attack the validity of the $260,000 deed of trust, dated March 27, 1961, be and the same are denied and dismissed.

Copies of this order are directed to be mailed to B. B. Woodson, Esq., Trustee, 242 Court Square, Charlottesville, Virginia; Robert M. Musselman, Esq., 413 7th Street, N. E., Charlottesville, Virginia; Carl E. Hennrich, Esq. and George Gilmer, Esq., Court Square Building, Charlottesville, Virginia.

PHILIP H. HICKSON
Referee in Bankruptcy

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APPENDIX G

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE DIVISION

October 28, 1966

In the matter of
STERLING R. DECKER et als,
Bankrupts.
} In Bankruptcy No. 707

ORDER

Upon the motion of George Gilmer, filed herein on July 5, 1966, for a review and reversal of the order entered herein by Referee Philip H. Hickson on June 24, 1966, and the Referee's Certified Record of Proceedings filed herein on July 12, 1966, oral argument of counsel, both in support of said petition and in opposition thereto, having been heard in open court on September 28, 1966, and briefs of counsel having been read and considered, it appearing to the court, for reasons fully set out in its Memorandum this day filed, that the said order of Referee Hickson of June 24, 1966, is plainly right, it is so adjudged.

It is therefore

ORDERED

that the said petition of George Gilmer for review and reversal of Referee Hickson's said order, be, and the same is, hereby overruled, and that the said order of Referee Hickson of June 24, 1966, be, and the same is, hereby affirmed.

Copies hereof, together with the Court's Memorandum, will be mailed to all counsel of record.

Enter:

A. D. BARKSDALE
United States District Judge

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE DIVISION

October 28, 1966

In the matter of

STERLING R. DECKER et als, Bankrupts. } In Bankruptcy No, 707

MEMORANDUM

This complicated and troublesome bankruptcy matter comes before me again upon the petition of George Gilmer, the principal creditor, to review the order entered herein by Referee Philip H. Hickson on June 24, 1966. This order embodies the Referee's memorandum of opinion construing the mandate of the Court of Appeals entered pursuant to the opinion of that court in the case of *Gilmer* v. *Woodson, Trustee,* 332 F. 2d 541.

The adjudication in this matter took place on January 11, 1962, and the first meeting of creditors was held on February 15, 1962. B. B. Woodson was appointed Trustee, hearings were held, and by his order entered on July 3, 1962, Referee Julian Hickman made findings of fact in narrative form and stated certain conclusions. Both Gilmer and Woodson, Trustee, filed petitions for review of that order. In his certificate for such review, Referee Hickman set forth detailed findings of fact and stated separately his conclusions of law. After considering briefs and hearing oral argument, I entered an order on May 25, 1963, reversing in part and affirming in part Referee Hickman's order of July 3, 1962. From my order of May 25, 1963, Gilmer appealed and Woodson, Trustee, cross appealed. It was upon this appeal and cross appeal that the Court of Appeals filed its opinion in *Gilmer* v. *Woodson, supra.* The decision of the Court

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of Appeals was to affirm my order of May 25, 1963, in several particulars of no materiality now, and to reverse my decision on what the opinion referred to as the "main issue". The court said (p. 544):

> "The main issue before us is whether the $260,000.00 deed of trust dated March 27, 1961, within one year prior to bankruptcy, was, upon the facts found by the referee and approved by the District Court, properly held to be void as a fraudulent transfer under the provisions of either Section 67, sub. d(2)(a), or Section 67, sub. d (2)(d) of the Bankruptcy Act."

The deed of trust referred to, executed by the bankrupt and his wife, conveying virtually all of their real estate, and the bond which it secured, were delivered to The Peoples National Bank for the following purpose, as shown by a notation on the back of the bond:

> "This bond is held primarily as security for any notes of Sterling R. Decker and/or Mary Jane Decker endorsed by George Gilmer now or hereafter held by The Peoples National Bank of Charlottesville, Virginia."

At that time, the antecedent indebtedness meant to be secured amounted to $249,199.31.

In its opinion (p. 544), The Court of Appeals said:

> "Based upon his findings of fact stated above, the referee, in his original order of July 3, 1962, concluded, as a matter of law, that the deed of trust of March 27, 1961, was *not* voidable as a fraudulent transfer under the provisions of either section 67, sub. d. or section 70, sub. e. of the act. However, in his certification to the District Court, the referee stated that he felt that his initial conclusion had been wrong and that the deed of trust *was* voidable under the provisions of section 67, sub. d(2)(a) in that the element of 'fair consideration', as that term is defined in section 67, sub. d(1)(3), was lacking in the

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particular circumstances of the case and that Decker was insolvent at the time the transfer was made. The court below not only affirmed this portion of the referee's ultimate conclusions but went even further, stating that 'the evidence convinces the court that, in the execution of the deed of trust of March 27, 1961, the bankrupts had the actual intent to hinder and delay existing and future creditors,' and holding that the deed of trust was therefore fraudulent and voidable under section 67, sub. d(2)(d) as well. In this latter conclusion the court in effect held that there was no substantial evidence in the record to support the referee's finding that the deed of trust was not given with an intent to hinder, delay or defraud creditors. We feel that the referee's finding in this regard *is* supported by substantial and credible evidence and that the action of the District Court in this particular was error. As stated by the referee in his original order, 'All parties who were parties to the preliminary discussions leading up to the $260,000.00 deed of trust, with the exception of Mary Jane Decker who has not testified, have testified that it was not the intent of the bankrupts to delay, hinder, or defraud creditors by the execution and recordation of said deed of trust.' As to any other evidence in the record offered to refute this direct testimony as to intent, we agree with the further statement of the referee in said order that 'from the record in this proceeding, it cannot be determined with any degree of certainty that the bankrupts at the time of the execution and delivery of said deed of trust had an intent to hinder, delay, or defraud, or that the deed of trust was subsequently employed for such fraudulent purposes,' and that 'to set aside as fraudulent a conveyance such as this on no stronger evidence of intent to defraud than is demonstrated by the evidence would subject to successful attack in bankruptcy many bona fide transactions.' Where the referee's findings are based upon conflicting evidence, as here, the reviewing court should not disturb such findings unless they are not

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supported by any substantial evidence or there is most cogent evidence of mistake or miscarriage of justice. See, generally, 2 Collier on Bankruptcy, paragraph 39.28 (14th Ed. 1962); 1 Remington on Bankruptcy, Sec. 3418 (1935)."

At the conclusion of its opinion, the Court of Appeals said (p. 548):

> "The case will be remanded for further proceedings not inconsistent with this opinion.
>
> "Affirmed in part, reversed in part and remanded."

Upon receipt of the mandate, I entered an order re-referring the matter to Referee Julian Hickman "for such further proceedings as may be necessary and proper and not inconsistent with the said opinion of the United States Court for the Fourth Circuit."

Thereupon, Referee Hickman entered an order for a hearing of "the matters to be concluded by the recommittal order entered by Judge Barksdale." Preparatory to the hearing, the Trustee filed a memorandum of twenty-four specific issues to be heard by the Referee. Most of the material issues relate to the disputed $260,000.00 deed of trust. These issues would permit the taking of evidence and submit to determination most, if not all, of the same issues which were the subject of the opinion of the Court of Appeals. George Gilmer objected to any hearing on the issues proposed for hearing by the Trustee, contending that the decision of the Court of Appeals was *res adjudicata* as to the validity of the $260,000.00 deed of trust, that this decision concluded "all issues tried or which could have been tried in the Trustee's attack on the deed of trust and the question of usury."

Notwithstanding Gilmer's objection, Referee Hickman conducted lengthy hearings and permitted the taking of new evidence. Unfortunately, before announcing his

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opinion or entering any order subsequent to the remand and re-referral, Referee Hickman came to an untimely death. Further delay was occasioned by the sad deaths of two of the attorneys who had participated in this matter since its inception. After Referee Hickman's death, the matter was referred to his successor, Philip H. Hickson, whose order is the subject of this petition for review. In his order, Referee Hickson recited that,

> "The Referee to whom this proceeding was referred (meaning himself) was a complete stranger to it and without knowledge of the former procedures. Under such circumstances, it was felt expedient at the outset to make a determination of the purport and effect of the mandate remanding this cause for further proceedings. The parties have been heard and the authorities cited have been considered. The Trustee takes the position that the effect of the mandate remanding the cause for further proceedings is to permit the introduction of new issues and evidence and the reconsideration of the matters which were the subject of the appeal to the Circuit Court of Appeals. It is the position of Gilmer that the opinion of the Circuit Court of Appeals was a final adjudication of all matters upon appeal and expressly the validity of the $260,000.00 deed of trust and the question of usury and that neither of such matters may be further contested."

Referee Hickson concluded that,

> "Each the Trustee and Gilmer is entitled to a retrial upon all relevant issues which he might properly present concerning holdings of the District Court reversed upon the appeal."

In his order Referee Hickson points out, as a change of circumstances since the remand, that, by a decision of the Supreme Court of Appeals of Virginia on September 11, 1964 (*Woodson, Trustee* v. *Gilmer et als*, 205 Va. 487, 137 S. E. 2d 891), it has been adjudicated that, as

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of April 26, 1957, a partnership composed of Decker, Gilmer and others was created, which partnership continued until it was terminated by Decker's adjudication in bankruptcy on January 11, 1962, which partnership was created and existed for the purposes of ownership and development of the real estate known as "Berkeley", which was the principal, if not the only, real estate included in the $260,000.00 deed of trust from Decker and wife to secure Gilmer, and that this new circumstance should be considered in his determination of the validity of the $260,000.00 deed of trust. Referee Hickson goes on to say that:

> "In view of the decision of the Virginia Supreme Court, the issue may arise whether a partner, acting in his individual capacity, may grant a valid deed of trust upon partnership property.".

and that this issue should be determined. Undoubtedly, the determination that, at the time of the execution of the deed of trust, Decker, Gilmer and others were partners, does create a situation not considered by Referee Hickman. If the Trustee should contend that the fact that at the time of the execution of the $260,000.00 deed of trust Gilmer and Decker were partners, renders the deed of trust invalid, then, of course, Referee Hickson should pass on this contention. However, it would seem that, unless there should be some highly cogent new evidence, this issue should give little trouble. Although, of course, it is hardly conceivable that a partner, acting in his individual capacity and for his own benefit, could convey away the interests of non-participating partners, it would seem that there is little, if any, doubt that one partner may make a valid conveyance to a trustee to secure another partner, of his *own interests* in partnership property, if the transaction was in good faith on the part of both the grantor and the beneficiary. As to the

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matter of good faith, the opinion of the Court of Appeals in *Gilmer* v. *Woodson, supra,* (p. 547), said:

> "The valuation of the antecedent debt and the deed of trust is not questioned, and the Referee found as a fact, justifiably, that the antecedent debt thus secured was not disproportionately small. Under the circumstances, Gilmer cannot be held to have lacked good faith with respect to valuing either the debt or the security obtained."

Since the opinion of the Court of Appeals did not specifically hold the $260,000.00 deed of trust to be valid, but only went so far as to reverse my holding that it was invalid, it is my conclusion, for the reasons stated by Referee Hickson, and the authorities cited, discussed and relied upon in his order, to affirm the order of the Referee of June 24, 1966, which is the subject of this review. An order will be entered accordingly.

However, it is plain to me that, if the evidence taken at the hearings already held since the remand, and such evidence as may be taken at further hearings, result in a finding by Referee Hickson of the same, or substantially the same, facts as found by Referee Hickman, then Referee Hickson should hold that the disputed deed of trust is valid, as any other holding would be inconsistent with the decision of the Court of Appeals in *Gilmer* v. *Woodson, supra.*

A. D. Barksdale
United States District Judge

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APPENDIX H

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE DIVISION

In the matter of:

Sterling R. Decker and Mary Jane Decker, Partners, t/a Berkeley Community Builders,
Bankrupt.

In Bankruptcy
No. 707

ORDER AND MEMORANDUM OF OPINION CONSTRUING MANDATE OF THE CIRCUIT COURT OF APPEALS UPON REMAND FOR FURTHER PROCEEDINGS CONCERNING DEED OF TRUST OF MARCH 27, 1961 and $260,000.00 BOND

At Charlottesville, in said District, this 24th day of June 1966.

The opinion of the Circuit Court of Appeals in *Gilmer* v. *Woodson*, Trustee in bankruptcy, 332 F. 2d 541 (1964) affirmed in part and reversed in part the decree of the District Court and the cause was remanded. Upon receiving the mandate of the Court of Appeals, the District Court entered its order reinstating this cause on the docket and re-referred it to one of its Referees "for such further proceedings as may be necessary and proper and not inconsistent with the said opinion of the United States Court of Appeals for the Fourth Circuit". Thereupon the Referee entered an order for a hearing of "the

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matters to be concluded by the recommital order entered by Judge Barksdale." Preparatory to the hearing the Trustee filed a memorandum of 24 specific issues to be heard by the Referee. Most of the material issues relate to the disputed $260,000.00 deed of Trust. These issues would permit the taking of evidence and submit to determination most, if not all, of the same issues which are the subject of the opinion of the Circuit Court of Appeals. George Gilmer, party to the cause upon remand, filed his answer objecting to the issues proposed for hearing by the Trustee. The basis of Gilmer's objection, in substance, is that the decision of the Circuit Court concludes "all issues tried or which could have been tried in the Trustee's attack on the deed of trust and the question of usury". Thereafter the Referee conducted lengthy hearings and permitted the taking of new evidence. Needless to say, because of the extensive involvement of the affairs of this bankrupt and of the interrelation between the personal affairs of the bankrupt and his bankrupt corporate activities and the multiple issues raised in the proceedings, the record is voluminous and most confusing. Unfortunately before announcing his opinion or entering his order upon any of the issues asserted and upon which hearings were held, since remand of the cause, the Referee was stricken and his untimely death occurred. Further delay was occasioned by the sad deaths of two of the attorneys who had participated in this proceeding since its inception and in the trials in the District Court and Circuit Court of Appeals. The Referee to whom the proceeding was re-referred was a complete stranger to it and without knowledge of the former procedures. Under such circumstances it was felt expedient at the outset to make a determination of the purport and effect of the mandate remanding this cause for further proceedings. The parties have been heard and the au-

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thorities cited have been considered. The Trustee takes the position that the effect of the mandate remanding the cause for further proceedings is to permit the introduction of new issues and evidence and the reconsideration of the matters which were the subject of the appeal to the Circuit Court of Appeals. It is the position of Gilmer that the opinion of the Circuit Court of Appeals was a final adjudication of all matters upon appeal and expressly of the validity of the $260,000.00 deed of trust and the question of usury and that neither of such matters may be further contested. Gilmer's position as to the effect of the opinion of the Court of Appeals and permissible procedures upon the remand are specifically stated in his brief filed December 6, 1965, pages 20-26.

The mandate of the Circuit Court of Appeals in this case is in the usual form:

> "The case will be remanded for further proceedings not inconsistent with this opinion.
> "Affirmed in part, reversed in part, and remanded."
> *Gilmer* v. *Woodson*, C. A. 4th 1964, 332 F. 2d 541, 548.

A leading case upon the construction of the mandate of the Appeals Court was decided by the Circuit Court of Appeals for the Seventh Judicial Circuit. That Court had entered its mandate in the customary form concluding:

> "The decree is reversed, and the cause remanded for further proceedings not inconsistent with this opinion". *Hawkins* v. *Cleveland, C. C. & St. L. Ry. Co.*, 89 F. 266.

After the decision was certified down the appellant moved for a specific provision in the decree, to be entered in obeyance to the mandate, and pending this motion the appellee gave notice of its motion for leave to amend its

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bill by adding certain averments of fact. Thereupon the trial judge, expressed his belief that amendments to the bill and further hearing without direction of the appellate court would not be in accordance with the mandate, deferred action upon the motions to permit appellee to seek from the appellate court a modification of the mandate. The opinion is written in the proceeding before the Circuit Court of Appeals by the appellee upon a "Motion to Modify the Mandate" of the appeals court reversing the decree of the trial court.

The opinion of the Court upon motion to modify the mandate states the mandate was in the customary form and further stated:

> "If there arises dispute over the proper interpretation or application of an opinion, the remedy of the complaining party must be by mandamus or by a second appeal. *Metcalf* v. *City of Watertown*, 34 U. S. 107, 16 CCA. 37, 68 F. 859.
>
> "In respect to the motion of the appellee for leave to amend its petition by adding the further averments proposed, the application to this court was unnecessary. The rule is well established, as declared in *Durant* v. *Essex Co.*, 101 U. S. 555, 25 L. Ed. 961:
>
> > 'In a mandate from this court, affirming a decree, the circuit court can only record our order, and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established.' *Southard* v. *Russell*, 16 How. 547, 14 L. Ed. 1052; (other authorities cited are here omitted).
>
> "The rule, it will be found, has been applied only when the decree in the circuit court had been affirmed, or, if reversed, another decree or judgment had been ordered by the appellate court, and a review thereof was sought after the affirmance or the entry of the decree so ordered. In *Southard* v. *Russell* the supreme court had reversed a decree on the

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pleadings and proofs, dismissing the bill, and had ordered a decree in favor of the complainant; and, after decree in the circuit court in obedience to the mandate, that court, without leave obtained of the supreme court, had entertained a bill of review, and after hearing upon the pleadings and proof, partly new, again had dismissed the bill. In the present case *the decree below was reversed*, but, instead of a direction for the entry of any particular decree, the mandate was, as stated, that further proceedings should be had, not inconsistent with the opinion of court. The effect *was to put the case in the same posture as if no decree had ever been entered*, and in that situation the court had the same authority to permit an amendment of the petition or bill of the appellee for the purpose of enlarging the issue and of admitting further proofs as it had before the entry of the reversed decree." *Hawkins* v. *Cleveland, C. C. & St. L. Ry. Co.*, C. A. 7th, 1900, 99 F. 322, 323 et seq. (Underscoring supplied.)

The very question under consideration has been the subject of opinion of our Circuit Court of Appeals in a bankruptcy matter. The facts of the case were that Liberty National Bank of Roanoke recovered judgment against two individuals composing a partnership within four months of the bankruptcy of the partnership but more than four months before adjudication of the individual partners. In the proceedings of the individuals the bank filed its claim to have it allowed as a lien against the property of the individuals. The Trustee objected on the ground that the judgment was obtained within four months of the adjudication of the partnership. The referee held that the adjudication of the partnership was an adjudication of the individuals composing it. The district court reversed and the circuit court of appeals reversed the decree of the district court, holding the adjudication of the partnership necessarily was an adjudication of the individuals composing it. Without passing

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on this question the Supreme Court reversed the decree of the Circuit Court on the ground the Trustee neither alleged nor proved the insolvency of the individuals at the date of the bankrupt's judgment. The opinion concludes with the customary language that:

> "* * * the decree of the Circuit Court of Appeals is reversed and the cause remanded to the District Court for further proceedings not inconsistent with this opinion".

The District Court permitted the Trustee to amend so as to allege and prove insolvency of the individual partners at the time the judgment was recovered. The question upon review was whether the District Court had the power to allow the amendment and proof. The Circuit Court of Appeals stated in ascertaining the effect of the opinion of the Supreme Court, consideration must be given to the language and reasoning of the opinion, and the conclusion stated in the opinion and the mandate. The opinion points out the insolvency question had not been tried—it was an issue of fact. Had the Supreme Court intended to shut off amendment and trial its mandate would have been for reversal of the Circuit Court *and affirmance* of the District Court. There was no final adjudication on the issue which was the basis of the Supreme Court's opinion. The opinion of the Circuit Court of Appeals states:

> "In that situation, the rule is well established that when the appellate court remands the case for further proceedings not inconsistent with its opinion or in conformity therewith, it expresses the intention that its decree should *not* be final and the pleadings should be open for amendment at the discretion of the trial court". *Liberty Nat. Bank* v. *Bear*, C. A. 4th 1925, 4 F. 2d 240, 242, Cert. Den. 268, U. S. 693, 45 S. Ct. 512, 69 L. Ed. 1160. (Underscoring supplied.)

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Concerning Gilmer's argument that the opinion of the Circuit Court of Appeals "has reversed the District Court's finding of error as to the validity of the Deed of Trust, and this ruling is final and binding upon the District Court and the Referee. * * * the ruling is *res judicata*". (Gilmer's Brief, p. 20, filed December 6, 1965.) This specific argument was the subject of an opinion of the Circuit Court of Appeals for the Second Judicial Circuit. The case there was an action upon contract for the price of oil delivered and damages for oil not taken. The first opinion of the appeals court reversed the decision of the district court on the ground that as to the second cause of action the complaint was insufficient for failure to allege tender or excuse for not tendering delivery of oil. After the mandate was filed, the district court entered its order dismissing the second cause of action and reduced the judgment for plaintiff accordingly, The judgment so reduced was paid. Thereafter, action was brought for the same damages asserted in the second cause of action in the first complaint. The prior judgment was pleaded as *res judicata*. The plea was sustained and the second complaint was dismissed without submitting the case to a jury. The opinion of the appeals court states:

> "When this court reversed the judgment obtained in the first action, the effect was to wipe out the prior trial with respect to the second cause or action, and to leave nothing but the pleadings, which the district court could have permitted to be amended. (Authorities cited are omitted but included *Hawkins* v. *Cleveland, C. C. & St. L. Ry. Co.,* supra; *Liberty Nat. Bank* v. *Bear,* supra.) We were restricted to the judgment roll and we held that the complaint was insufficient, but we had not ordered it dismissed. That was done by the district court sua sponte and before the plaintiff had put in any evidence whatever, as the case stood after reversal. So the dis-

missal was on the pleadings and was not declared to be on the merits. (* * * authority cited.) The defense of *res judicata* was erroneously sustained." *Bisbee Linseed Co.* v. *Paragon Paint and Varnish Corp.*, C. A. 2d 1937, 89 F. 2d 18, 19.

The reason for the rule of construction of a mandate reversing the decision of the trial court has been stated:

> "It cannot be determined in advance what relevant issues may be presented upon the second trial or just what evidence may be introduced tending to establish or refute them. Appellant is entitled to a retrial upon all relevant issues which he might properly present, and this he has not had. * * * We do not undertake to particularize the issues which appellant claims were left undetermined by the district court or to forecast what issues may arise upon another trial. These are matters for the consideration of the lower court if and when they are properly presented." *Miller* v. *U. S.*, C. A. 6th 1949, 173 F. 2d 922, 924.

Succinctly put:

> "Ordinarily, after a judgment has been reversed on appeal and the cause remanded, the case stands for trial de novo on the issues properly joined." *Shell Petroleum Co.* v. *Shore*, C.A. 10th 1935, 80 F. 2d 785, 786.

The scope of the retrial after reversal on appeal and upon remand is said to be:

> "On the prior appeal this court reversed the judgment and remanded the case for further proceedings in harmony with the opinion. The action being one at law, the reversal of the judgment entitled the parties to a new trial of the action without restriction or limitation." *Illinois P. & L. Corp.* v. *Hurley*, C. A. 8th 1931, 49 F. 2d 681, 683.

It is argued by Gilmer that the effect of the reversal of the order of the Judge of the district court, which re-

versed the order of the Referee, is to reinstate the order of the Referee. This argument erroneously conceives two courts, a lower court presided over by the referee and a higher court presided over by the district judge. "Court" is defined to mean the judge or the referee of the court of bankruptcy, including the United States District Court. Bankruptcy Act Sec. 1 (9) and (10). The referee is invested with the jurisdiction of the court of bankruptcy, subject always to review by the judge of the district court. B. A. Sec. 38. Review of the orders of the Referee is reserved to the Judge, not of a different court, but review by the judge of the court of bankruptcy. B. A. Sec. 39c. The order of the District Judge, upon review of the order of the referee, becomes the order of the Court of Bankruptcy. It was the order of the Judge of the District Court which was appealed and which is the subject of the opinion of the Circuit Court of Appeals. Accordingly, those matters covered by the order of the District Judge entered May 25, 1963, and which were *affirmed* by the opinion of the Circuit Court of Appeals, are *res judicata* and the Referee may only proceed with the execution of the order of the Judge as affirmed. As to matters which were covered by the said order of the Judge and which were *reversed* by the opinion of the Circuit Court of Appeals the case stands for trial *de novo* on those matters and the parties are entitled to a new trial without restriction or limitation of those issues.

As was pointed out in the opinion in *Hawkins* v. *Cleveland, C. C. & St. L. Ry. Co.*, supra, the appeals court cannot determine in advance what relevant issues may be presented upon the second trial or just what evidence may be introduced to establish or refute them. Each the Trustee and Gilmer is entitled to a retrial upon all relevant issues which he might properly present concerning holdings of the District Court reversed upon the appeal.

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This includes issues which have arisen by a change of circumstances since the former order of the District Judge and opinion of the Appeals Court. To illustrate but not intending to indicate the significance, since the entry of that order and opinion the Supreme Court of Appeals of Virginia has entered its opinion in a suit filed by Sterling Decker, the bankrupt, against George Gilmer, who is the same George Gilmer concerned with the remand of this proceeding by the Circuit Court of Appeals, and the other parties who were designated in the opinion of the Circuit Court of Appeals as "other co-owners" of the tract of land known as Berkeley. In the case filed in the State Court the bankrupt alleged that a partnership existed between him, and the other defendants to that suit, that George Gilmer and others had instituted involuntary bankruptcy proceedings against him; that if he were adjudicated a bankrupt the partnership would be dissolved automatically under state statute, and that disputes existing among the partners made it impracticable for the partnership to be wound up by any one of the partners. The principal property concerned with the suit in the State Court is the tract of land known as Berkeley. This is the principal property conveyed by the $260,000.00 deed of trust and the validity of which was the principal subject of the opinion of the Circuit Court of Appeals. The opinion of the Supreme Court of Virginia decided there was a partnership between the bankrupt, Gilmer and those denominated "co-owners" of Berkeley. The state appeals court remanded the suit for further proceedings and the state trial court is now winding up the partnership. In such proceedings the unsold portions of "Berkeley", constituting property belonging to the partnership, will be sold and the proceeds distributed, except that this Court of Bankruptcy retains exclusive jurisdiction to determine the validity of the $260,000.00

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deed of trust. (Letter written by Referee to T. Munford Boyd, Esq., Receiver of State Court, dated October 15, 1965 and his reply dated October 20, 1965.) *Woodson* v. *Gilmer*, Sept. 11, 1964, 205 Va. 487. In view of the decision of the Virginia Supreme Court the issue may arise whether a partner, acting in his individual capacity, may grant a valid deed of trust upon partnership property. Such an issue is proper to be determined under this opinion.

This opinion is the ruling of this Court upon the question of law presented and is to be considered as the *Order* of this Court defining the basis for the further procedures under the mandate of the Circuit Court of Appeals in *Gilmer* v. *Woodson*, decided May 25, 1964, 332 F. 2d 541. Either of the parties desiring a formal order in accord with this opinion, with designation of the matters finally determined and matters which may be the subject of further proceedings, may submit such an order within ten (10) days next hereafter for entry.

Copies of this order are directed to be mailed to Robert M. Musselman, Esq., George Gilmer, Esq., B. B. Woodson, Esq., James H. Michael, Jr., Esq., Carl E. Hennrich, Esq., T. Munford Boyd, Esq. and Edward R. Slaughter, Jr., Esq.

PHILIP H. HICKSON
Referee in Bankruptcy

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APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9107.

GEORGE GILMER, Creditor,
Appellant and Cross-Appellee,

versus

B. B. WOODSON, Trustee in Bankruptcy,
Appellee and Cross-Appellant.
In the Matters of
Sterling R. Decker, Bankrupt,
In Bankruptcy, No. 706; and
Sterling R. Decker and Mary
Jane Decker, Partners, t/a
Berkeley Community Builders,
Bankrupts, In Bankruptcy No. 707.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT CHARLOTTESVILLE. ALFRED D. BARKSDALE, DISTRICT JUDGE.

(Argued November 8, 1963. Decided May 25, 1964.)

Before HAYNSWORTH, BOREMAN and BRYAN,
Circuit Judges.

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Charles A. Via, Jr., (Richmond and Via, and Carl E. Hennrich on brief) for Appellant and Cross-Appellee, and William S. Aaron, Jr., and Robert M. Musselman (Walker, Woodson and Aaron on brief) for Appellee and Cross-Appellant.

BOREMAN, Circuit Judge:

This is another in a series of complicated and troublesome appeals from decisions of the District Court for the Western District of Virginia in proceedings in bankruptcy involving the affairs and estate of Sterling R. Decker, bankrupt.

By order entered as of July 3, 1962, the Referee in Bankruptcy made findings of fact, in narrative form, and stated certain conclusions. Both George Gilmer and the Trustee in Bankruptcy filed petitions for review of that order by the District Court. Upon certifying the matters for such review the referee set forth, in fifty-three enumerated paragraphs, detailed findings of fact and stated separate conclusions of law. The District Court entered its order reversing in part and affirming in part the referee's order of July 3, 1962. It is from this order of the court below that George Gilmer appeals and Woodson, the Trustee in Bankruptcy, cross-appeals.

As to all except three of the fifty-three particularly enumerated findings of fact by the referee, which are substantially the same as the facts recited in the referee's order of July 3, there is no material disagreement between the parties here so that the primary issues presented are whether the facts so found support the conclusions reached below.

In December 1956, Sterling R. Decker, hereinafter referred to as Decker, together with Charles Hurt, pur-

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chased, and subdivided into residential lots, a tract of land consisting of 110.68 acres of land known as Berkeley. The land was purchased from W. Hallam Tuck and part of the purchase price was evidenced and paid by a $16,000.00 deferred purchase money bond, hereinafter referred to as the "Tuck bond," executed by Decker and Hurt and secured by a deed of trust against the property. In early 1957 George Gilmer, a Charlottesville lawyer, and three other persons acquired Hurt's interest in the land and assumed among them Hurt's liability on the Tuck bond. Thereafter, Decker, Gilmer and the other co-owners entered into an agreement giving Decker an option to purchase the interest of others in the lots in Berkeley at a certain fixed price and providing that Decker alone would develop Berkeley as a residential area.

Decker began development in 1957 in partnership with his wife under the name of Berkeley Community Builders. In time he organized Commonwealth Utilities, Inc., to provide a water and sewer system for the subdivision. All of the common stock of this corporation was owned by Decker and his wife except one share owned by Gilmer. Decker also organized Albert Mahanes Company, Inc., to perform the grading, earth moving, ditching and road building. Of this corporation Decker owned fifty per cent and Albert Mahanes owned fifty per cent. Decker himself was in charge of the direction, operation and bookkeeping of all three organizations.

In the development of Berkeley into a residential subdivision, entailing the purchase of his co-owners' outstanding interest in the lots, reselling them and building houses thereon for the ultimate purchasers, Decker began to require large amounts of working capital which he could not provide. He arranged with Mr. Adams, an officer of the Peoples National Bank, to obtain funds from the bank

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upon the personal credit of Gilmer, a man of considerable means whose credit appeared to be substantially unlimited. Under the arrangement, whenever Decker needed funds for his undertaking he executed unsecured promissory notes in the amounts desired, obtained the endorsement of Gilmer thereon and discounted the notes at the bank.

This credit arrangement with Gilmer and the bank operated for a period of approximately two years during which time it was clearly shown that when he devoted his time and close attention to the project, Decker was able to make the Berkeley operation successful and highly profitable. However, during the latter part of 1960 and the early part of 1961, Decker, apparently because of involvement in a number of other ventures which attracted his interest and with the forlorn hope of adding to his income, began to neglect the Berkeley project and, as a result, was faced with increasingly serious financial problems. He had, without the consent or knowledge of either the bank or Gilmer, diverted funds borrowed under the credit arrangement for use in the Berkeley project to his other business ventures. This situation was first discovered by the bank during the early part of 1961 when it was obvious that Decker's loans were not being repaid satisfactorily.

Both Mr. Adams of the bank and Gilmer became concerned about Decker's situation and, because they had been financing Decker so heavily, decided to acquire some sort of control over his financial activities, to attempt to dissuade him from engaging in other ventures and force him to concentrate his efforts toward developing Berkeley. As of March 27, 1961, the bank was holding promissory notes executed by Decker and endorsed by Gilmer in the total aggregate sum of $249,199.31. Additionally, the bank was holding promissory notes of Al-

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bert Mahanes Company aggregating $22,479.34 and a promissory note of Commonwealth Utilities, Inc., in the amount of $70,000.00, all of which notes were endorsed by both Decker and Gilmer.

On March 27, 1961, Decker and his wife executed a deed of trust, covering virtually all of their real estate, and a bond payable to bearer on demand in the amount of $260,000.00, with interest at the rate of 6% per annum, secured by the deed of trust. The bond and deed of trust were delivered to and held by the bank as collateral security for the payment of the promissory notes executed by Decker and endorsed by Gilmer pursuant to a plan intended, in part, to enable Gilmer and the bank to exercise more control over Decker's finances, as well as to provide security to Gilmer as endorser of Decker's promissory notes held by the bank. An "escrow" account was established under the control of Gilmer and a "reserve" account was established under the control of the bank to handle all of the income and expenses attributable to certain aspects of the Berkeley project. The secured bond was drawn in an amount in excess of the then aggregate amount of the Decker notes endorsed by Gilmer to enable the bank to subsequently lend more money to Decker under the plan and bring these loans under the security thus afforded. Evidencing this purpose, there is printed on the back of the bond the following:

> "This bond is held primarily as security for any notes of Sterling R. Decker and/or Mary Jane Decker endorsed by George Gilmer now or hereafter held by The Peoples National Bank of Charlottesville, Virginia."

After the new financing plan went into effect, there was a flurry of activity by Decker in the Berkeley subdivision and it appeared that the project was back on

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the road to success. In fact, several new houses were sold, others were constructed and sold under financially profitable arrangements, and progress was made in paying claims of various creditors. However, several of Decker's miscellaneous creditors began to press him for payment and by November 15, 1961, the bank felt it necessary to demand payment of all the Gilmer-endorsed notes on which Decker was either maker or endorser. Accordingly, on that date Gilmer paid and took an assignment from the bank of all the Gilmer-endorsed Decker notes in the aggregate sum of $247,275.00.

By two supplemental deeds of trust dated August 10, 1961, and October 20, 1961, recorded September 5, 1961, and October 31, 1961, respectively, Decker and his wife conveyed in trust their one-half interest in a total of twenty-one additional lots in Berkeley Subdivision to secure the $260,000.00 demand bearer bond dated March 27, 1961. The involuntary bankruptcy petitions were filed herein on December 11, 1961, and it is conceded by all parties, as was found by the referee, that the liens of these two supplemental deeds of trust fall within the four-month period preceding bankruptcy. The referee and the court below held that the two supplemental deeds of trust constituted voidable preferences under section 60(a)(1) of the Bankruptcy Act, having been given as additional security for antecedent debts. Gilmer contends that the transfers did not enable him to obtain a greater percentage of his debt than any other creditor of the same class and hence were not voidable preferences. The contention in this regard, which we find to be wholly without merit, is based upon the fact that immediately prior to the recordation of these deeds of trust, Gilmer released from the lien of the original $260,000.00 deed of trust a number of lots of substantial value. When these lots were so released they, or the proceeds from their sale, became part

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of the assets of Decker's estate. Clearly, if not voided, the supplemental deeds of trust would constitute transfers which would effectively enable Gilmer to obtain a greater percentage of his debt than other unsecured creditors. The fact that Gilmer had voluntarily relinquished an even better position earlier is wholly immaterial.

The *main issue* before us is whether the $260,000.00 deed of trust dated March 27, 1961, within one year prior to bankruptcy was, upon the facts as found by the referee and approved by the District Court, properly held to be void as a fraudulent transfer under the provisions of either section 67 (d) (2) *(a)* or section 67 (d) (2) *(d)* of the Bankruptcy Act.[1]

In his order of July 3, 1962, hereinbefore mentioned, the referee found as facts that Decker's business was not materially curtailed, if curtailed at all, by the recordation of said deed of trust; that said deed of trust was not executed with bankruptcy in mind; that, except insofar as the conveyance was made to secure debts of Albert Mahanes Company, Inc., and Commonwealth Utilities, Inc., said deed of trust and the $260,000.00 bond thereby secured were not executed and delivered with an intent to hinder, delay or defraud creditors; and that the amount of the antecedent primary debts of Decker which said deed of trust was given to secure was not disproportion-

1. Section 67(d) (2) of the Bankruptcy Act, 11 U.S.C.A. § 107(d) (2), provides as follows:

"Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; * * * or (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors."

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ately small as compared with the value of the property transferred in trust. The referee further found, however, that insofar as the deed of trust was given as security for the payment of debts of Albert Mahanes Company, Inc., and Commonwealth Utilities, Inc., the transfer was without consideration of any kind in that Decker's liability thereon was purely secondary as endorser rather than as maker.

Whether or not Decker's secondary liability as endorser of the notes of the two corporations was sufficient consideration in legal contemplation to support the deed of trust or any part thereof is, it seems, entirely beside the point. As was found by the referee, based upon substantial evidence in the record, the bond which the deed of trust was given to secure was itself not intended to encompass Decker's possible liability on these notes but only notes of Decker and/or his wife endorsed by George Gilmer, as is evidenced by the wording on the back of the bond hereinbefore quoted. There is, therefore, no logical basis upon which to predicate a claim that the deed of trust was given as security for these Mahanes Company and Commonwealth Utilities corporation notes.

Based upon his findings of fact stated above, the referee, in his original order of July 3, 1962, concluded, as a matter of law, that the deed of trust of March 27, 1961, was *not* voidable as a fraudulent transfer under the provisions of either section 67(d) or section 70(e) of the act. However, in his certification to the District Court, the referee stated that he felt that his initial conclusion had been wrong and that the deed of trust *was* voidable under the provisions of section 67(d) (2) (a) in that the element of "fair consideration," as that term is defined in section 67(d) (1) (e) [2], was lacking in the par-

2. Section 67(d)(1) of the Bankruptcy Act, 11 U.S.C.A. § 107(d)(1).

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ticular circumstances of the case and that Decker was insolvent at the time the transfer was made. The court below not only affirmed this portion of the referee's ultimate conclusions but went even further, stating that "the evidence convinces this court that, in the execution of the deed of trust of March 27, 1961, the bankrupts had the actual intent to hinder and delay existing and future creditors," and holding that the deed of trust was therefore fraudulent and voidable under section 67(d) (2) (d) as well. In this latter conclusion the court in effect held that there was no substantial evidence in the record to support the referee's finding that the deed of trust was *not* given with an intent to hinder, delay or defraud creditors. We feel that the referee's finding in this regard *is* supported by substantial and credible evidence and that the action of the District Court in this particular was error. As stated by the referee in his original order, "All parties who were parties to the preliminary discussions leading up to the $260,000.00 deed of trust, with the exception of Mary Jane Decker who has not testified, have testified that it was not the intent of the bankrupts to delay, hinder, or defraud creditors by the execution and recordation of said deed of trust." As to any other evidence in the record offered to refute this direct testimony as to intent, we agree with the further statement of the referee in said order that "from the record in this proceeding, it cannot be determined with any degree of certainty that the bankrupts at the time of the execution and delivery

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in defining the terms applicable to subdivision (d) of section 67, provides:

"(e) consideration given for the property or obligation of a debtor is 'fair' (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained."

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of said deed of trust had an intent to hinder, delay, or defraud, or that the deed of trust was subsequently employed for such fraudulent purposes," and that "to set aside as fraudulent a conveyance such as this on no stronger evidence of intent to defraud than is demonstrated by the evidence would subject to successful attack in bankruptcy many bona fide transactions." Where the referee's findings are based upon conflicting evidence, as here, the reviewing court should not disturb such findings unless they are not supported by any substantial evidence or there is most cogent evidence of mistake and miscarriage of justice. See, generally, 2 Collier on Bankruptcy, paragraph 39.28 (14th Ed. 1962); 8 Remington on Bankruptcy, § 3418 (1955).

Whether the referee's amended conclusion, affirmed by the District Court, that the deed of trust was voidable under the provisions of section 67(d) (2) (a) is based upon a correct construction of the applicable law and supported by substantial evidence in the record is next to be determined. In order to come within the terms of section 67(d) (2) (a),[3] the transfer to be voidable must have been made without "fair consideration," as that term is defined by section 67(d) (1) (e),[4] *and* by a debtor who is or will be thereby rendered insolvent. Under this particular provision the actual intent of the debtor is not material.

The referee found as a fact that as of the date of the deed of trust Decker and his wife were insolvent. This was in effect affirmed by the court below and we cannot say that, in the light of the evidence in the record, such finding was clearly wrong. As the statutory definition should be applied to the instant case, consideration for the bond and deed of trust was "fair" if it was received

3. See footnote 1, supra.
4. See footnote 2, supra.

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in good faith to secure an antecedent debt in an amount not disproportionately small as compared with the value of the property conveyed in trust and the obligation obtained.[5] As we previously noted, the referee found as a fact that the deed of trust was given to secure an antecedent debt in an amount *not* disproportionately small as compared to the value of the property conveyed in trust. The only remaining issue to be considered and resolved with regard to voidability is whether the deed of trust was "received in good faith." The referee concluded, in effect, that George Gilmer, in receiving the deed of trust did *not* act in "good faith" as that term has been defined by the courts. In his discussion of this issue in the certification to the District Court, the referee based his conclusion of lack of good faith ostensibly upon the following findings: That Mr. Gilmer was legal counsel for the Deckers and was thoroughly familiar with their affairs; that at the time of the giving of the deed of trust the Deckers were indebted to many creditors who held no security; and that if this deed of trust is set aside, the benefits will inure to all unsecured creditors whose claims are allowed in the bankruptcy proceeding. The District Court simply affirmed on the basis of the referee's findings and conclusions.

The rationale of the referee's conclusion, although not entirely clear, seems to be that since Gilmer had been a close personal friend and the regular legal counsel for the Deckers for several years he was, at least presumably, familiar with their affairs and he should have known that the Deckers were insolvent at the time the deed of trust was given.

It is clear that "fair consideration," as the term applies to the instant case, requires both an antecedent debt which is in an amount not disproportionately small as compared

5. Section 67(d) (1) (e) (2), supra, footnote 2.

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with the value of the deed of trust lien *and* good faith. See *Cohen* v. *Sutherland*, 257 F. 2d 737 (2 Cir. 1958). It is equally clear that in the case of one who receives security for, or property in satisfaction of, an antecedent debt, as distinguished from one who receives a transfer for a present consideration, good faith cannot be said to be lacking unless the transferee knowingly participated in the debtor-transferor's purpose to defeat other creditors or lacked good faith in valuing the property exchanged. See 4 Remington on Bankruptcy, § 1654 (1957). In the instant case it was *found as a fact* that the debtor-transferor (Decker) had no intent to defeat other creditors, so there neither was nor could there be any finding that Gilmer knowingly participated in any such intended purpose. Further, the antecedent debt sought to be secured was $249,199.31, and the value of the security received was $260,000.00. The valuation of the antecedent debt and the deed of trust is not questioned and the referee found as a fact, justifiably, that the antecedent debt thus secured was not disproportionately small. Under these circumstances, Gilmer cannot be held to have lacked good faith with respect to valuing either the debt or the security obtained. We think the *conclusion* of the referee in this particular and the affirmance thereof by the court below cannot be sustained.

We next consider certain claims of Gilmer arising out of his endorsement of Decker's notes discounted at the bank. Although there is a dispute on the particular point, we agree with the finding of the District Court that there is revealed by the evidence a clearly understood verbal contract between Decker and Gilmer that Gilmer was to receive, for lending his credit by endorsing these notes, a fee, initially at the rate of 6% per annum (calculated on the face amount of each endorsed note while unpaid at the bank) which after March 27, 1961, was reduced to 3%

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per annum (calculated on $260,000.00, the face amount of the bond described in the March 27, 1961, deed of trust given to secure then existing Gilmer endorsed notes and others to be thereafter endorsed and held by the bank). The referee held that any amounts which Gilmer had collected on account of his endorsements (the exact amounts not then known but to be later ascertained) should be credited to reduce the principal of the endorsed notes and that Gilmer's claim for any unpaid endorsement fees should be disallowed. However, it is clear from the record, as found by the District Court, that the bank, not Gilmer, was the actual lender, that the bank had no interest whatsoever in such payments and that the fees or charges were not usurious. The District Court properly reversed the finding and conclusion of the referee and held that the endorsement fees to Gilmer, both paid and unpaid, were lawful. See *Chakales* v. *Djiovanides*, 161 Va. 48, 170 S.E. 848 (1933); *Keagy* v. *Trout*, 85 Va. 390, 7 S. E. 329 (1888); annot. 52 A.L.R. 2d 703, 710 et seq. (1957).

The next question presented arises from Gilmer's claim of the right to retain as collateral for a $16,000.00 note the Tuck bond, hereinbefore mentioned. Included in the $247,275.00 worth of Decker-made, Gilmer-endorsed notes which Gilmer was required to pay on November 15, 1961, was a $16,000.00 note, the proceeds of which had been used to satisfy the obligation to Tuck on the Tuck bond. As before stated, the original makers of the Tuck bond were Decker and Charles Hurt, and the bond was secured by a deferred purchase money deed of trust on the remaining Berkeley lands. Tuck, the payee and holder of the bond, wanted his money and had threatened foreclosure under his deed of trust. In order to obtain the money to satisfy Tuck, Decker executed the $16,000.00 note and Gilmer endorsed it with the alleged un-

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derstanding that the Tuck bond be purchased rather than paid and assigned to Gilmer as collateral not only for the $16,000.00 note but also for any other debts of Decker. The $16,000.00 note was taken by the bank on June 13, 1961, and on that same date the Tuck bond was placed in Gilmer's personal collateral file. The Tuck bond is endorsed, "For value received the within bond is assigned to George Gilmer without recourse. W. Hallum Tuck by Robert Musselman, attorney." The referee ordered Gilmer to surrender the bond to the trustee and release any lien given to secure its payment. The only reasons assigned by the referee for his disposition of this matter were: That there was no evidence to support Gilmer's contention that there was an agreement between him and Decker that the latter would borrow $16,000.00 to pay Tuck and would then permit Gilmer to hold the Tuck bond as additional security; since the payment of one-half of this bond had been assumed by others, Decker should not have been required by Gilmer or anyone else to borrow funds to pay a debt for which others were obligated. The District Court affirmed the referee's order as "plainly right" for reasons set out by the referee.

No authority has been cited by the referee, the court below or any of the parties respecting the issue of the Tuck bond and deed of trust. Gilmer contends that since he in effect paid the $16,000.00 debt to Tuck by taking up the $16,000.00 note which he had had endorsed, he is entitled to hold the Tuck bond assigned to him and the deed of trust securing it, conceding, however, that he claims the protection of this collateral security only to the extent of $8,000.00, Decker's proportionate obligation on the Tuck bond. We are of the opinion that, irrespective of the reasons assigned, the referee's order should be sustained. When Gilmer and the others assumed Hurt's liability on the bond, they become jointly and

severally primarily liable thereon, and the subsequent payment thereof by Gilmer discharged and extinguished the bond, no matter what his intention may have been. See *Cussen* v. *Brandt*, 97 Va. 1, 32 S. E. 791, 793 (1899) (dictum); *Perkins* v. *Hall*, 123 W. Va. 707, 17 S. E. 2d 795 (1941); 11 Am. Jur. 2d, Bills and Notes, § 963 (1963); 10 C.J.S., Bills and Notes, § 449 (1938); Va. Code, § 6-472 (1) (Michie 1950).

The case will be remanded for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part and remanded.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE DIVISION

IN THE MATTERS OF
Sterling R. Decker,
Bankrupt

In Bankruptcy No. 706

Sterling R. Decker and
Mary Jane Decker, Partners
t/a Berkeley Community Builders,
Bankrupts

In Bankruptcy No. 707

At Harrisonburg, Virginia, in said District, on July 3, 1962.

Involuntary petitions were filed against Sterling R. Decker, individually, and Sterling R. Decker and Mary Jane Decker, Partners, t/a Berkeley Community Builders, on December 11, 1961, and on the issue joined by the original petition, and amended petition duly filed, and the answer filed by each of the alleged bankrupts, an order was entered in each proceeding on January 12, 1962, adjudging Sterling R. Decker, individually, and Sterling R. Decker and Mary Jane Decker, Partners, t/a Berkeley Community Builders, bankrupts.

On April 20, 1962, the duly appointed and qualified Trustees in each of the proceedings filed pleadings, with copies thereof to George Gilmer, Esquire, The Peoples National Bank of Charlottesville, Charles A. Via, Jr., Esquire, attorney for George Gilmer, attacking, among other things, a deed of trust dated March 27, 1961, exe-

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cuted by Sterling R. Decker and Mary Jane Decker by which virtually all of the real estate of the grantors was conveyed unto Downing L. Smith and Richard H. Barrick to secure the payment of a demand Bearer bond, bearing even date with the deed of trust, in the amount of $260,000.00. This deed of trust was recorded in the Clerk's Office of Albemarle County on March 28, 1961, and is there of record in Deed Book 266, at Page 446, and was duly recorded in the Clerk's Office of the Corporation Court for the City of Charlottesville and is there of record in Deed Book 225, at Page 67. This deed of trust was also executed by Jefferson Park Commons Corporation, denoted in the deed as a Virginia corporation. It appears from the deed that Jefferson Park Commons Corporation, of which Sterling R. Decker was President and Mary Jane Decker was Secretary, joined in the deed for the purpose of conveying to the Trustees the fee simple title to Lots No. 17, 18, and 19, "plat recorded in D. B. 221, p. 408", subject to a deed of trust lien of $36,000.00. The real estate of Jefferson Park Commons Corporation has or will be sold and the net proceeds applied on the deeds of trust in the order of their priority; therefore, we need not concern ourselves further with Jefferson Park Commons Corporation.

Mr. Gilmer had been regular counsel for the bankrupts from 1956 or 1957 (Volume 3, Page 22). In his capacity as attorney for the bankrupts, Mr. Gilmer "handled all of the deeds of trust except two". Mr. Gilmer, as a personal and social friend of the Deckers, as their counsel and as a financial backer was thoroughly familiar with the affairs and financial condition of the bankrupts both prior and subsequent to March 27, 1961.

The Trustees in their pleadings attack other transfers and assignments made by the bankrupts, either or both of them, to or for the benefit of George Gilmer.

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On April 21, 1962, Mr. Gilmer, in person and by counsel, filed an answer to the Trustees' pleadings. Pursuant to notice to all parties entitled thereto, various hearings have been held on these pleadings. On April 24, 1962, and May 9, 1962, hearings were held on the specific issues raised by the pleadings.

It was agreed by all parties concerned that the matters raised by the pleadings should be heard and determined by the Referee.

The record in this proceeding shows that in 1956 Sterling R. Decker and Mary Jane Decker, husband and wife, organized a partnership under the name of Commonwealth Construction. The general purpose and object of this partnership was the acquisition of real estate, the construction of dwelling houses, and other buildings, and the sale of improved and unimproved lots owned by the partnership. The partners, apparently in 1958, changed the name of the partnership from Commonwealth Construction to Berkeley Community Builders, but the partnership continued as before for the same general purpose.

Even though the partnership was organized with limited capital and was a heavy borrower from its inception it had a successful and financially profitable business until the latter part of the year 1960. One of the reasons why the business of the partnership became less profitable, or at least why the bankrupts began falling behind in the payment of debts was because Dr. Decker through his zeal to make money at a rapid clip spread both his energies and his finances over too many activities. It became necessary for both Mr. Gilmer and The Peoples National Bank to exert more control over both the activities and finances.

The record does not show what the initial arrangements were between the bankrupts and Mr. Gilmer as to financial needs and requirements of the bankrupts. Whether

the bankrupts initially borrowed money direct from Mr. Gilmer, or from sources available to him, the record does not show. The record does show that for approximately two years prior to March 27, 1961, Mr. Gilmer had been endorsing the bankrupts' promissory notes which were made payable to the order of and held by The Peoples National Bank of Charlottesville. Prior to March 27, 1961, representatives of The Peoples National Bank of Charlottesville had been concerned about the condition of the bankrupts' accounts (Volume 3, Page 79). Mr. Gilmer had also expressed concern about the condition of the bankrupts' indebtedness (Volume 3, Page 79).

On March 27, 1961, The Peoples National Bank of Charlottesville was holding promissory notes executed by the bankrupts aggregating $249,199.31 (Volume 3, Pages 68, 69, and 70), on all of which notes George Gilmer was endorser. In addition to the notes of the bankrupts, endorsed by George Gilmer, the bank held other promissory notes which had been discounted by one or both of the bankrupts at said bank. In addition, the bank held promissory notes of Albert Mahanes Co., Inc., and Commonwealth Utilities, endorsed by Sterling R. Decker and George Gilmer.

The Trustees in these proceedings under the circumstances would have been derelict in their duties and responsibilities as representatives of the unsecured creditors had they not sought to have the $260,000.00 deed of trust set aside either under Section 70e or Section 67d of the Bankruptcy Act.

> "Whenever a debtor is adjudged a bankrupt, and a Trustee in Bankruptcy is appointed, it becomes the duty of such Trustee to collect and distribute such assets in accordance with the provisions of the bankruptcy law." *Moore vs. Bowman 151 Va. 434; 145 SE 421, 423*

The Trustee in Bankruptcy is required under the Bankruptcy Act to initiate any and all action which may be necessary to collect assets of the bankrupt, and to initiate such action as may be necessary, under the circumstances in each particular case, to set aside what may appear to have been fraudulent transfers and preferential transfers.

It is quite evident that at least one of the objectives and purposes of the $260,000.00 deed of trust was to secure Mr. Gilmer as endorser of the promissory notes of the bankrupts which were held by The Peoples National Bank of Charlottesville, and also to enable the endorser and said bank to exercise more control over the finances and the assets of the bankrupts.

At the time of the execution and delivery of the deed of trust of $260,000.00, some of the creditors of the bankrupts had become impatient. One creditor had obtained a deed of trust to secure the payment of an antecedent debt owed by the bankrupts. It does not appear, however, that any suits were instituted for the collection of antecedent debts until August, 1961.

All persons who were parties to the preliminary discussions leading up to the $260,000.00 deed of trust, with the exception of Mary Jane Decker who has not testified, have testified that it was not the intent of the bankrupts to delay, hinder, or defraud creditors by the execution and recordation of said deed of trust. These interested parties have testified that the financial condition of the bankrupts was enhanced by the deed of trust because the bankrupts were thereby enabled to borrow additional funds as needed for the construction of houses and the acquisition of additional land. The contention of the Trustee is that the financial condition of the bankrupts was not enhanced by the deed of trust, and that the deed

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of trust enabled the bankrupts to delay, hinder, or defraud their creditors.

Following the execution, delivery, and recordation of the deed of trust and the demand Bearer bond, various lots were from time to time released from the lien of the deed of trust upon sales of the lots by the bankrupts. Counsel for Mr. Gilmer stated in his brief that 22 such releases were made, but I have not been able to find from the record more than 16 such releases. The number, however, regardless of whether it was 16 or 22, is sufficient to show that the business of the bankrupts was not materially curtailed, if curtailed at all, by the recordation of said deed of trust.

As to whether the $260,000.00 bond and deed of trust constituted a fraudulent transfer of assets under Section 70e of the Bankruptcy Act and Section 55-80 of the Code of Virginia poses and presents a problem which does not readily lend itself to an easy solution, especially in view of the relationship of attorney-client which existed between the maker and endorser. An attorney who deals with his clients on other than an attorney-client relationship must exercise an extremely high degree of circumspection. This relationship does not, however, present a badge of fraud and the relationship alone is not sufficient to show an intent to defraud, unless fraud is apparent upon the face of the instrument itself or is clear and convincing from the evidence.

In these cases the question of fraud under Section 70e of the Bankruptcy Act is to be determined by the law of the State of Virginia as construed and determined by the Virginia Supreme Court of Appeals. This is true because there are no federal interests involved in this instant which would make non-bankruptcy federal law applicable.

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The Virginia Supreme Court of Appeals, in cases too numerous to mention, has held that:

> "The proof in a suit to set aside a fraudulent conveyance must be clear, cogent, and convincing, and the burden rests on the party alleging the existence of fraud."

A cash sale for a fair consideration by an insolvent debtor of his property, where *his intent* is not to get the property away from all creditors, but simply to use the proceeds in paying certain creditors in preference to all others, is not a fraudulent transaction although the effect is to leave little for the remaining creditors, is a well recognized principal which has evolved from the decisions of the Virginia Supreme Court of Appeals. The effect of a transfer to or for the benefit of certain creditors may be that no assets remain for other creditors, but in making the transfer if the grantor did not *intend* to delay, hinder, or defraud his other creditors, the transfer is impregnable against attack.

The intent of the debtor in transferring assets, whether to secure particular creditors, or whether to obtain cash, is a question of fact to be determined from the facts and circumstances presented by the particular case.

Generally, it is presumed that persons have dealt honestly, fairly, and properly with each other. Fraud can never be presumed. One non-bankruptcy case in particular which the Virginia Supreme Court of Appeals had for determination was the case of *Bruce vs. Dean, 149 Va. 39; 140 SE 277*, in which a man conveyed all of his real estate in trust for the purpose of defraying the expenses of maintenance, education and rearing six children of the grantor. Creditors of the grantor instituted suit to have the conveyance set aside under what was then Section 5184 of the Code of Virginia—now Section 55-80. The Supreme Court in holding that the grantor had a

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right to prefer the Industrial School, the beneficiary under the deed of trust, to the exclusion of all other creditors stated:

> "Under such circumstances there was no intent to hinder, delay, or defraud creditors, and proof of intent to do one of these things is necessary before a deed can be set aside upon the grounds alleged in these proceedings."

In order for the Trustee in Bankruptcy to avoid a conveyance under Section 70e of the Bankruptcy Act and Section 55-80 of the Code of Virginia, he must prove by clear and convincing evidence that the conveyance complained of was sired by a fraudulent intent to delay, hinder, or defraud creditors, or if such intent did not exist at the time of the conveyance, the conveyance was subsequently adopted and employed for such fraudulent purposes. He must further prove that the one to whom the transfer was made or for whose benefit the transfer was given knew of or had reason to believe that the transferor had such a fraudulent intent. If proof of the fraudulent intent on the part of the transferor, with knowledge of such intent on the part of the one to whom or for whose benefit the transfer was made, is established, it is not essential that insolvency at the time of the transfer be proved.

Both the Trustee and the attorney for Mr. Gilmer cited in their respective briefs the case of *Dean vs. Davis, Trustee, etc., 242 US 438*. The gravamen of this decision applied to the facts and circumstances in this case is:

> "Making a mortgage to secure an advance with which the insolvent debtor intends to pay a pre-existing debt does not necessarily imply an intent to hinder, delay, or defraud creditors. The mortgage may be made in the expectation that thereby the debtor will extricate himself from a particular difficulty and be enabled to promote the interest of all

other creditors by continuing his business. The lender who makes an advance for that purpose with full knowledge of facts may be acting in perfect 'good faith'. But where the advance is made to enable the debtor to make a preferential payment with bankruptcy *in contemplation,* the transaction presents an element upon which fraud may be predicated." (Underscoring supplied)

The facts in these cases do not indicate that the $260,000.00 deed of trust was executed with bankruptcy in mind. On May 1, 1961, Decker did indicate to John Bailey of the Internal Revenue Service that if the Internal Revenue Service recorded a lien for delinquent taxes such act might force the debtors into bankruptcy (Volume 3, Page 165).

The relationship between the bankrupts, The Peoples National Bank, and Gilmer was such that if the bankrupts at the time of the execution and delivery of the $260,000.00 deed of trust and bond had an intent to hinder, delay, or defraud creditors, both The Peoples National Bank and Gilmer had available to them all information which would have enabled them to know that the bankrupts had such an intent.

From the record in this proceeding, it cannot be determined with any degree of certainty that the bankrupts at the time of the execution and delivery of said deed of trust had an intent to hinder, delay, or defraud, or that the deed of trust was subsequently employed for such fraudulent purposes. To set aside as fraudulent a conveyance such as this on no stronger evidence of intent to defraud than is demonstrated by the evidence would subject to successful attack in bankrutpcy many bona fide transactions. It is accordingly

ADJUDGED, ORDERED and DECREED that at the time of the execution and delivery of said demand Bearer bond and the deed of trust given to secure the

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payment of the same and the promissory notes of the bankrupts for which the demand Bearer bond was held as collateral were not, under the provisions of Section 70e of the Bankruptcy Act and Section 55-80 of the Code of Virginia, executed and delivered with an intent to hinder, delay, or defraud creditors of the bankrupts, except insofar as the conveyance was made to secure debts of Albert Mahanes Co., Inc., and Commonwealth Utilities.

It is further ORDERED that the amount and extent of said deed of trust of $260,000.00 and the bond for a like amount will be the amount as hereinafter determined by this order.

We next turn to the validity and effect of the deed of trust as construed and determined under the provisions of Section 67d of the Bankruptcy Act.

Section 67d (1) is the portion of the section by which terms are defined. Section 67d (2) is the portion of the section by which the Trustee is enabled and empowered to set aside conveyances which are not within the definitions under Section 67d (1) and fall within the prohibited categories under Section 67d (2).

If a conveyance or transfer is made without a fair consideration—as the term "fair consideration" is defined under Section 67d (1)—at a time when the transferor was insolvent, or rendered insolvent by the transfer, there is a conclusive presumption of fraud, any intent to the contrary notwithstanding.

The evidence in these cases shows that the deed of trust was given to secure an antecedent deed in an amount not disproportionately small as compared with the value of the property transferred in trust, only insofar as it applies to the transfer made to secure the payment of the antecedent primary debts of the bankrupts.

Insofar as the transfer was made to secure the pay-

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ment of debts of Albert Mahanes Co., Inc., and Commonwealth Utilities, the transfer was made without consideration of any kind, and is void, under Section 67d of the Act.

The holder of the $260,000.00 bond has attempted to read into the bond an obligation which does not exist. On the back of the bond there is this language:

> "This bond is held *primarily as security* for any notes of Sterling R. Decker and/or Mary Jane Decker endorsed by George Gilmer now or hereafter held by The Peoples National Bank of Charlottesville, Va." (Underscoring supplied).

The bankrupts were under no legal obligation to convey their assets as security for debts of others, to the detriment of their own creditors, even though all of the parties at the time may have contemplated that the $260,000.00 deed of trust would secure the bankrupts' direct and indirect liabilities.

Unquestionably, insofar as the parties involved now attempt to have said deed of trust operate as security for not only the debts of the bankrupts, but also for the debts of Albert Mahanes Co., Inc., and Commonwealth Utilities on which the Deckers had become obligated as endorsers, the transfer was without fair consideration, and such additional debts, if allowed, would unquestionably have rendered the bankrupts insolvent at the time of the transfer, or the capital remaining in their hands would have been unreasonably small.

Accordingly, it is ADJUDGED, ORDERED and DECREED that the deed of trust of March 27, 1961, for $260,000.00 was not a voidable transfer of assets under Section 67d of the Bankruptcy Act, only insofar as it secured the promissory notes executed by the bankrupts, endorsed by Gilmer, and held by The Peoples National Bank of Charlottesville, but is void as to any

and all debts of Albert Mahanes Co., Inc., and Commonwealth Utilities.

The next matter to be considered and determined is the question of attorney's fees for the attorneys representing George Gilmer in these proceedings.

The demand Bearer bond of $260,000.00 and the deed of trust securing the payment of the same do not provide for attorney's fees. The recordation of the deed of trust did not constitute notice that the deed of trust was given to secure the payment of principal of $260,000.00, plus interest, and attorney's fees if collected by an attorney after default. It is accordingly ORDERED that the deed of trust does not constitute a lien for attorney's fees on the real estate therein described and conveyed. As to whether Mr. Gilmer is entitled to attorney's fees under the various promissory notes of the bankrupts, for which the demand Bearer bond for $260,000.00 was held as collateral, will be hereinafter dealt with in this order.

The next question to be determined is whether Mr. Gilmer was entitled to charge and to receive from the bankrupts six per centum per annum on the promissory notes endorsed by him for the bankrupts at The Peoples National Bank of Charlottesville. This endorsement charge was reduced to three per centum per annum after March 27, 1961. The three per cent charge was computed on the bond of $260,000.00.

No one can expect a lender of funds to be an Antonio of The Merchant of Venice, but an accommodation endorser does not stand in the same position as a lender. Whether Mr. Gilmer was the initial lender, or whether he was merely the accommodation endorser from the beginning, the record does not show.

The record is abundantly clear that the bankrupts had paid to The Peoples National Bank of Charlottesville, the owner and holder of the promissory notes endorsed

by Mr. Gilmer, all interest from the date of the original notes and all renewals thereof to November 15, 1961.

At Page 56 of Volume 3 of the transcript, Mr. Gilmer testified as follows in response to the following question:

"Q—My understanding then is that your contention is that interest should be collected both on the collateral as well as the primary debt?

A—Proved it is all credited to the primary debts, there is that proviso, you cannot collect on the collateral without applying it to the primary debt."

At Page 62 of Volume 3 of the transcript, Mr. Gilmer testified, in substance, that he was entitled to 6% "for a separate fee", and that he has "as much right to charge a fee for endorsing a note as a security company has for charging a fee for going on" a bond. At Page 199 of Volume 3 Mr. Gilmer testified that he had reduced his endorsement fees of six per centum per annum on the "direct lien of the Decker's".

At Page 237 of Volume 3 of the transcript, Dr. Decker, in response to questions asked by the Trustee, testified as follows:

"Q—Were you here today when Mr. Gilmer testified pertaining to the endorsement fees?

A—Yes sir.

Q—Was that in conformity with your recollection of it?

A—Yes sir."

No evidence has been introduced by the endorser to show that there was a definite and fixed contract between him and the bankrupts concerning the charges to be made by the endorser for lending his security. If there was a definite and fixed contract between the parties prior to the time of the endorsement of the promissory notes, then probably Mr. Gilmer would be entitled to a reasonable

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endorsement charge. In the absence of such a contract, clear and definite in its terms, an attorney is not entitled to charge his clients for lending his security. The case of *Chakales et al v. Djrovanides et al 161 Va. 48, 170 S. E. 848*, did not involve the same factual conditions as those in these cases, but the court's opinion contains principles of law applicable to these proceedings.

It was incumbent upon the endorser to prove that he was not the initial lender, and that there was a definite and fixed contract between him and his clients as to what charges, if any, would be made by the attorney for lending his security to his clients. It has not been shown that Mr. Gilmer was not the initial lender, nor has it been shown by Mr. Gilmer that there was a definite and fixed contract that he was selling his security to his clients for a definite and fixed charge. Dr. Decker stated at Page 237 of Volume 3 that Mr. Gilmer's recitation as to the endorsement fees conformed with his recollection, but this does not constitute a contract.

It is

ORDERED that Mr. Gilmer is not entitled to any endorsement charges which he has collected from the bankrupts, and is not entitled to any endorsement charges made by him which he has not collected.

The record is not clear as to the total amount which Mr. Gilmer collected from the bankrupts for endorsing the bankrupts' promissory notes. Therefore, it is

ORDERED that the amount so collected, plus the amount which Gilmer collected from the bankrupts for endorsing the promissory notes of Albert Mahanes Co., Inc., and Commonwealth Utilities, shall be determined by further hearings, and the amount ascertained to have been collected shall be applied on the principal of the debt.

On November 15, 1961, after having been required so

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to do by said bank, Gilmer paid to The Peoples National Bank of Charlottesville $247,275.00 (Volume 3, Page 48, 88 and 89) in settlement of the direct obligations of the bankrupts. Of this amount, however, $16,000.00 was borrowed by the bankrupts on June 13, 1961, to pay the balance of deferred purchase money owed by the bankrupts and others to Hallam Tuck and Hilda Tuck (Volume 3, Pages 40, 41, 42, 43, 44, 102 and 210). One-half of this indebtedness had been assumed by David J. Wood, Joseph M. Wood, George Gilmer, Jr., and George Gilmer, Sr. Why the bankrupts were put to the expense, at least for interest, in borrowing $16,000.00, when only one-half thereof was actually owed by them, the record does not show except at Page 42, of Volume 3 Mr. Gilmer testified:

> "As long as they (speaking of Mr. Wood et al) have indirectly paid their one-half, I think that it would be most inequitable to hold them for it."

Mr. Gilmer did testify specifically and definitely at Page 42 that he claimed as a debt against the bankrupts only one-half of this promissory note. The bankrupts having borrowed the money to pay off the balance of the debt owed to the Tuck's, Mr. Gilmer had no right to have the Tuck bond assigned to him as additional collateral; therefore it is

ORDERED that Mr. George Gilmer forthwith surrender the bond which was assigned to him by the Tuck's to the Trustee in this proceeding; and release of record in the Clerk's Office any lien which may have been given to secure the payment of the bond to the Tuck's.

It is further ORDERED that the extent of the deed of trust lien in favor of George Gilmer is $247,275.00, plus interest on principal as determined by this order from November 15, 1961, to date of payment if the security is sufficient to pay costs of administration and principal

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and interest, reduced by the following principal payments as of the dates of payments:

(a) One-half of the Tuck bond, or $8,000.00.

(b) All endorsement charges collected by Gilmer from the bankrupts for endorsing their notes, the notes of Albert Mahanes Co., Inc., and Commonwealth Utilities.

(c) $8,890.60 collected by Gilmer from the sale of Jefferson Park Commons Corporation lots.

(d) $25,000.00 collected by Gilmer from Landon Birckhead.

(e) All interest paid by the bankrupts to The Peoples National Bank on one-half of the Tuck bond from June 13, 1961.

(f) Any and all other payments received by Gilmer, directly or indirectly, from the bankrupts, other than such payments which may have been made by the bankrupts to Mr. Gilmer as attorney's fees.

As hereinbefore stated, the demand Bearer bond does not provide for attorney's fees, but the promissory notes executed by the bankrupts and endorsed by Gilmer do provide for the payment of attorney's fees of 15%. The amount provided for attorney's fees in the promissory note is a limit upon the amount of the charge, not its measure. If Gilmer is entitled to attorney's fees on the promissory notes, there is no evidence in the record as to what the measure of the fees should be.

Under the law of Virginia a promissory note which contains a stipulation for payment of attorney's fees if collected by an attorney after default is a fixed contract as to the obligation, but only on a quantum meruit basis. It would be unconscionable in these proceedings to allow an attorney's fee of 15% on whatever payment Mr. Gilmer may receive under his deed of trust. The record in

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these proceedings is silent as to what efforts the attorneys may have made to effect collection of the promissory notes after default. The evidence merely shows that they were placed in the hands of the attorneys. No evidence has been introduced as to what would be a proper and reasonable fee to allow the attorneys for handling the collection of the promissory notes for Mr. Gilmer. Some decisions hold that services rendered by an attorney in collecting a promissory note which contains a stipulation for attorney's fees, is entitled to reasonable fees only for the services rendered up to the date of the filing of the petition by or against the bankrupts.

On the record as it now stands, it is

ORDERED that the request of Mr. Gilmer for allowance of attorney's fees of 15% is hereby denied.

The record in these proceedings is clear and convincing that for a period longer than four months prior to the date of the filing of the involuntary petitions, December 11, 1961, the bankrupts were insolvent, and it is so held, and it is further held that both Mr. Gilmer and The Peoples National Bank of Charlottesville knew, or had reason to believe, that the bankrupts were insolvent.

On August 10, 1961, Sterling R. Decker and Mary Jane Decker executed a deed of trust by which their one-half interest in 12 lots in the Berkeley Sub-division, which lots are designated by numbers in the deed of trust, were conveyed to Richard H. Barrick and Downing L. Smith, Trustees, to secure the payment of said demand Bearer bond of March 27, 1961, for $260,000.00. This deed of trust was recorded in the Clerk's Office of Albemarle County on September 5, 1961, and is there of record in Deed Book 371, at Page 239. By a deed of trust dated October 31, 1961, Sterling R. Decker and Mary Jane Decker executed a deed of trust by which their one-half interest in 9 lots in the Berkeley Sub-division, which lots

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are designated by numbers in the deed of trust, were conveyed to Richard H. Barrick and Downing L. Smith, Trustees, as further security of said demand Bearer bond of March 27, 1961, for $260,000.00. This deed of trust was recorded in the Clerk's Office of Albemarle County on October 31, 1961, and is there of record in Deed Book 373, at Page 81. Both of these deeds of trust were recorded within four months prior to the filing of the involuntary petitions in bankruptcy, at a time when the bankrupts were insolvent.

The money which was used to pay for a one-half interest in the lots described in and conveyed by said two deeds of trust came from a reserve account at The Peoples National Bank of Charlottesville. This reserve account had been established at the bank by the Deckers at the insistence of Mr. Gilmer and the bank. The reserve account was made up of money derived from the sale of lots and houses owned by the bankrupts (Volume 3, Pages 16, 20, 86, 105, 106, and 214).

It is true that a portion, if not all, of the reserve account was accumulated from the sale of real estate covered by the deed of trust of March 27, 1961, which was released by either The Peoples National Bank or Mr. Gilmer, along with the Trustees, from time to time as lots were sold. Upon the sale of the lots and the release of the lien by or at the direction of Mr. Gilmer and the payment of the net sale price into the reserve account, Mr. Gilmer had no further lien thereon.

The deed of trust recorded September 5, 1961, and the deed of trust recorded October 31, 1961, are clearly voidable preferential transfers of assets, under Section 60a (1) of the Bankruptcy Act, for the benefit of a creditor for an antecedent debt, while the bankrupts were insolvent, the effect which would result in a further depletion of the bankrupts' assets and would enable Mr.

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Gilmer to obtain a greater percentage of his debt than he is equitably entitled to. It is accordingly

ADJUDGED, ORDERED and **DECREED** that the deed of trust recorded September 5, 1961, and the deed of trust recorded October 31, 1961, are both null and void, and the beneficiary thereunder is hereby directed to cause said two deeds of trust to be released of record.

It further appears from the record in these proceedings that The Peoples National Bank of Charlottesville, Colligan Pipe Company, Payne Paving Company, and others may have received from the escrow account or from the reserve account, or both, voidable preferential payments on antecedent debts; therefore it is

ORDERED that the Trustee as soon as may be possible inquire into this matter and prepare the necessary pleadings for a hearing thereon if he is so advised.

It is further **ORDERED** that the following judgments, having been obtained against the bankrupts while the bankrupts were insolvent, are null and void, and the judgment creditors are hereby directed to release the judgments of record in the Clerk's Office where they are recorded.

JUDGMENT CREDITOR	*OBTAINED*
Atlantic Heating Supply Corp.	October 23, 1961
United States Fidelity and Guaranty Company, Assignee of Mayo Cabell and G. H. Story, t/a Cabell and Story	November 2, 1961
O. Robbins Randolph	December 22, 1961
Charlottesville Hardware Co., Inc.	December 21, 1961
Southern Electric Corporation	January 17, 1962
Atlantic Heating Supply Corp.	September 27, 1961

Any other matters covered by the pleadings and the evidence which have not been determined by this order will be determined at a later time.

JULIAN K. HICKMAN
Referee in Bankruptcy

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE DIVISION

IN THE MATTERS OF
Sterling R. Decker,
Bankrupt — In Bankruptcy No. 706

Sterling R. Decker and
Mary Jane Decker, Partners,
t/a Berkeley Community
Builders,
Bankrupts — In Bankruptcy No. 707

To The Honorable Thomas J. Michie, Judge of said Court:

REFEREE'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND CERTIFICATION

Both George Gilmer and the Trustee in these bankruptcy proceedings have filed a Petition for Review of the order entered by the Referee in these proceedings on July 3, 1962, and the undersigned Referee certifies the facts arising in these bankruptcy proceedings pertaining to the order entered on July 3, 1962.

PARTIES

B. B. Woodson, *Trustee for both bankrupts*
Attorney at Law
242 Court Square
Charlottesville, Virginia

George Gilmer, *Creditor*
Attorney at Law
Charlottesville, Virginia

Charles A. Via, Jr., *Attorney for George Gilmer*
Attorney at Law
Charlottesville, Virginia

Carl E. Hennrich, *Attorney for George Gilmer*
Attorney at Law
Charlottesville, Virginia

Robert M. Musselman, *Attorney for bankrupts*
Attorney at Law
413 Seventh Street, N. E.
Charlottesville, Virginia

ISSUES

(1) Whether a deed of trust dated March 27, 1961, executed by Sterling R. Decker and Mary Jane Decker by which real estate was conveyed in trust to secure the payment of a demand Bearer bond bearing even date with the deed of trust, executed by the grantors in the deed of trust, was given to hinder, delay or defraud creditors.

(2) Whether said deed of trust of March 27, 1961, is voidable under the provisions of Section 67d of the Bankruptcy Act.

(3) If said deed of trust is not voidable under "1" or "2" above, is it voidable under Section 73e and Section 67d of the Bankruptcy Act, or either section, as security for Albert Mahanes Co., Inc., and Commonwealth Utilities?

(4) If the deed of trust is not voidable under "1" or "2" above, does the deed of trust constitute a lien on the real estate conveyed for claimed attorney's fees?

(5) Is George Gilmer entitled to charge and to receive from the bankrupts a fee for endorsing the promissory notes of the bankrupts, which notes were owned and held by The Peoples National Bank of Charlottesville?

(6) If the deed of trust is not voidable under "1" or "2" above, what is the amount owed by the bankrupts under said deed of trust?

(7) Whether George Gilmer is entitled to hold as a part of his security a promissory note paid by the bankrupts to Hallum Tuck and Hilda Tuck, which promissory note was assigned by the Tucks to Mr. Gilmer.

(8) Whether George Gilmer is entitled to attorney's fees on the promissory notes endorsed by him, made payable to The Peoples National Bank of Charlottesville, and subsequently assigned to Gilmer by said bank.

(9) Whether a deed of trust executed on August 10, 1961, by the bankrupts by which certain real estate was conveyed in trust as additional security for said demand Bearer bond of March 27, 1961, was a voidable preferential transfer of assets.

(10) Whether a deed of trust executed by the bankrupts on October 31, 1961, by which certain additional real estate was conveyed in trust as additional security for said demand Bearer bond of March 27, 1961, was a voidable preferential transfer of assets.

ADDITIONAL ISSUES RAISED BY THE PETITION FOR REVIEW FILED BY GEORGE GILMER

(a) Whether the order of July 3, 1962, went beyond the pleadings and evidence.

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(b) Whether the burden was on the Trustee or Gilmer to prove that there was a contract between the bankrupts and Gilmer as to the charges to be made by Gilmer for endorsing the bankrupts' notes.

(c) Whether the burden was on the Trustee or Gilmer to prove that Gilmer is entitled to attorney's fees on the promissory notes which he as endorser was required to pay to The Peoples National Bank of Charlottesville and which he subsequently turned over to his attorneys for collection.

ADDITIONAL ISSUES RAISED BY THE PETITION FOR REVIEW FILED BY THE TRUSTEE

(a) If the deed of trust of March 27, 1961, is held to be valid, is Gilmer entitled to interest on the remaining principal balance due under said deed of trust?

FINDINGS OF FACTS

(1) Both Sterling R. Decker and Sterling R. Decker and Mary Jane Decker, Partners, t/a Berkeley Community Builders, were on January 12, 1962, adjudged bankrupts on the involuntary petitions filed.

(2) Pursuant to notice to all of the scheduled creditors in both proceedings, a hearing was held and an order entered on June 26, 1962, by which it was determined that all real estate, regardless of how title may have initially been taken, was by the intent and actions of the bankrupts converted to partnership assets. No Petition for Review was filed.

(3) The Trustee initially nominated and appointed

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for Sterling R. Decker and Mary Jane Decker, Partners, t/a Berkeley Community Builders, resigned as such Trustee after a conflict developed in the proceeding between the interest of the Trustee and the interest of a regular client of the Trustee. B. B. Woodson, the Trustee previously appointed for Sterling R. Decker, individually, was appointed Trustee for the partnership.

(4) On April 20, 1962, the Trustee in these proceedings filed a Notice of Hearing, with a copy thereof to George Gilmer, The Peoples National Bank of Charlottesville, and Charles A. Via, Jr., attorney for George Gilmer, in which Notice of Hearing various issues were raised concerning the transactions between George Gilmer, The Peoples National Bank of Charlottesville, and the bankrupts.

(5) On April 24, 1962, George Gilmer filed an Answer to the Trustee's Notice of Hearing, with copies to the Trustee.

(6) On April 24, and May 9, 1962, hearings were held concerning the transactions between the bankrupts and Mr. Gilmer, after all parties concerned had agreed to submit the questions to the Referee for hearing and determination.

(7) For approximately two years prior to March 27, 1961, Mr. Gilmer had been endorsing the bankrupts' promissory notes which were made payable to the order of and held by The Peoples National Bank of Charlottesville (Page 10).

(8) Mr. Gilmer had been regular counsel for the bankrupts since 1956 or 1957 (Page 22).

(9) Mr. Gilmer as attorney for the bankrupts had handled all of the purchases of real estate made by

them since 1956 or 1957 and had "handled all the deeds of trust except two" (Page 22).

(10) In addition to being counsel for the bankrupts, Mr. Gilmer was a close personal friend of the bankrupts (Pages 34 and 35).

(11) Prior to March 27, 1961, representatives of said bank had become concerned about the condition of the bankrupts' account at the bank (Pages 72, 74, 76, 78, and 79).

(12) Prior to March 27, 1961, Mr. Gilmer, as endorser of the bankrupts' promissory notes, had expressed concern about the bankrupts' indebtedness (Page 79), and both the lender and the endorser felt it necessary to exercise "some sort of control" over the bankrupts and their assets (Pages 23, 24, 25, and 27).

(13) On March 27, 1961, The Peoples National Bank of Charlottesville was holding promissory notes executed by the bankrupts, endorsed by Gilmer, aggregating $249,199.31 (Pages 68, 69, and 70).

(14) On March 27, 1961, the bankrupts executed a deed of trust by which virtually all of the real estate owned by the bankrupts was conveyed in trust to secure the payment of a demand Bearer bond, bearing even date with the deed of trust, in the amount of $260,000.00, which demand Bearer bond was executed by the grantors in the deed of trust. This deed of trust was recorded in the Clerk's Office of Albemarle County on March 28, 1961, and is there of record in Deed Book 366, at Page 446, and was recorded in the Clerk's Office of the Corporation Court for the City of Charlottesville and is there of record in Deed Book 255, at Page 67.

(15) The demand Bearer bond dated March 27, 1961, for $260,000.00, and the deed of trust given to secure the payment of the same, was subsequently held by The Peoples National Bank of Charlottesville as collateral for promissory notes executed by the bankrupts and endorsed by Gilmer (Pages 25, 39 and 49).

(16) The bankrupts, prior to the execution of said deed of trust of March 27, 1961, which deed of trust was given to secure the payment of antecedent debts, were indebted to other creditors, but no action had been instituted to enforce collection by legal proceedings of any debts owed by the bankrupts, except that one creditor had, prior to March 27, 1961, obtained and recorded a deed of trust to secure the payment of $27,500.00 (Page 24).

(17) Gilmer introduced a statement and offered testimony that the real estate owned by the Deckers on March 27, 1961, was worth approximately $344,000.00 (Page 27).

(18) The bankrupts had been overdrawing their bank accounts at The Peoples National Bank of Charlottesville for two or three months prior to March 27, 1961. (Pages 71, 72, 73, 74, 75, 76, and 77).

(19) In addition to the promissory notes executed by the bankrupts, endorsed by Gilmer and held by The Peoples National Bank of Charlottesville as of March 27, 1961, aggregating $249,199.31, the bank was also holding promissory notes of Albert Mahanes Co., Inc., aggregating $22,479.34, which promissory notes had been endorsed by Decker and Gilmer, and said bank was also holding a promissory note of Commonwealth Utilities, Inc., for $70,000.00, which note had been endorsed by

Sterling R. Decker, Mary Jane Decker and Gilmer (Pages 50 and 91).

(20) Sterling R. Decker was Vice President of Albert Mahanes Co., Inc., which corporation is also in bankruptcy.

(21) Sterling R. Decker was also an officer and active manager, whether with or without specific authority, of Commonwealth Utilities, Inc.

(22) Neither the demand Bearer bond nor the deed of trust given to secure the payment of the same, both of which are dated March 27, 1961, provide for the payment of attorney's fees if the bond is collected by an attorney after default, nor does the bond impose on the makers any obligation to pay costs or fees, if collected by an attorney after default.

(23) At or about the time of the execution of the deed of trust of March 27, 1961, representatives of the bank and Mr. Gilmer, with the consent and agreement of the Deckers, established at said bank a Reserve Account, and thereafter funds were deposited in the Reserve Account from the sale of lots owned by the bankrupts (Pages 16, 20, 86, 105, and 204).

(24) The Reserve Account was under the control of Mr. Adams of The Peoples National Bank of Charlottesville and Mr. Gilmer, but Mr. Adams was the only one who could draw checks thereon (Page 214).

(25) At or about the time of the execution of the deed of trust of March 27, 1961, an Escrow Account was also established at said bank, and thereafter when a contract was obtained for the sale of a lot with a house to be constructed thereon by the bankrupts, the sale price of the lot was deposited in

the Reserve Account and payments made by the purchaser (whether from independent sources or borrowed money) towards the construction costs were deposited in the Escrow Account (Pages 14, 86, 216 and 217).

(26) Mr. Gilmer was the only one who could draw checks on the Escrow Account, and after paying construction costs, profits on the construction of the houses were paid out for various purposes, including payments on antecedent debts (Pages 15, 86, 216, 217, and 218).

(27) After the execution and recordation of said deed of trust of March 27, 1961, various lots were from time to time sold and released from the deed of trust.

(28) It is the position of Mr. Gilmer that the $260,000.00 demand Bearer bond was held as security not only for the direct obligations of the bankrupts but also for promissory notes of Albert Mahanes Co., Inc., and Commonwealth Utilities, Inc., which notes had been endorsed by Sterling R. Decker and Mr. Gilmer (Pages 48, 89, first page numbered 91, 96, and 98).

(29) The evidence is clear and convincing throughout that as of March 27, 1961, and both for sometime prior thereto and continuously thereafter, the bankrupts were short of working capital, and at Page 23, Line 14, Mr. Gilmer testified that the bankrupts were "short of working capital", and that he, Mr. Roscoe Adams and Mrs. Decker were trying "to keep him from diverting money to other enterprises".

(30) On November 15, 1961, Mr. Gilmer, as endorser of the bankrupts' notes, was required to pay to The

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Peoples National Bank of Charlottesville, the owner and holder of said notes, the balance due on the Sterling R. Decker and Mary Jane Decker notes, which at that time amounted to $247,275.00 (Pages 48, 88 and 89).

(31) On February 15, 1962, Mr. Gilmer filed in the Sterling R. Decker proceeding a proof of claim in the amount of $41,505.44, and on July 28, 1962, Mr. Gilmer filed an amended claim in the amount of $55,266.10. This proof of claim does not appear to include any of the indebtedness which the bankrupts may owe to Mr. Gilmer under said demand Bearer bond of March 27, 1961.

(32) On February 15, 1962, Mr. Gilmer filed in the partnership proceeding a claim in the amount of $40,894.30, and on July 28, 1962, Mr. Gilmer filed an amended claim in the amount of $49,320.06. This claim does not appear to include any of the indebtedness owed by the bankrupts to Mr. Gilmer under said demand Bearer bond of March 27, 1961.

(33) The two claims filed by Mr. Gilmer in these proceedings are made up of various items, including insurance premiums, release fees, recording costs, documentary stamps, bad checks, promissory notes for attorney's fees, and shortages in Reserve Account.

(34) The schedule filed by Sterling R. Decker lists assets of $92,889.64 and liabilities of $108,979.44.

(35) The schedule filed by Sterling R. Decker and Mary Jane Decker, Partners, t/a Berkeley Community Builders, lists assets of $284,928.19 and liabilities of $210,735.01.

(36) The appraised value of the real estate and personal property in both proceedings is $361,958.17.

(37) Claims showing a fixed dollar amount filed in both proceedings aggregate $313,437.12. A proof of claim has been filed by the Trustee in Bankruptcy for Albert Mahanes Co., Inc., but the amount of the claim is not shown and has not been determined. The claims filed do not include the alleged secured claim of George Gilmer and the alleged secured claim of George Gilmer as assignee of Bernard P. Chamberlain. M. S. Jackson, Trustee, t/a H. T. Ferron, has been ordered to pay over to the Trustee in Bankruptcy $4,200.00, being a voidable transfer of assets, and a claim for this amount has not been filed.

(38) Virtually all of the claims which have been filed in these proceedings show that the indebtedness was incurred prior to March 27, 1961. Some of the indebtedness was initially incurred as long ago as 1954.

(39) Even if the real estate on or about March 27, 1961, had a fair market value of $344,000.00, as submitted by Mr. Gilmer, the record still shows that as of March 27, 1961, the bankrupts were insolvent.

(40) Mr. Gilmer had been charging and receiving from the bankrupts an endorsement fee of 6% on the face amount of the promissory notes endorsed by him for the bankrupts, and after the demand Bearer bond of $260,000.00 was executed this endorsement charge was reduced to 3% on $260,000.00 (Pages 61, 62, 63, 64, 198, 199, 200 and 201).

(41) Dr. Decker testified that Mr. Gilmer's testimony as to the endorsement charges is in conformity with his recollection of the matter (Page 237).

(42) A written contract between Gilmer and Deckers as to the endorsement charges was not introduced

nor does the evidence show there was a specific and clear contract between Deckers and Gilmer concerning the charges made and to be made by Gilmer for endorsing the Deckers' promissory notes.

(43) With respect to Mr. Gilmer's claim for reimbursement for attorney's fees on the promissory notes executed by the Deckers, the record merely shows that photostatic copies of the promissory notes were by Mr. Gilmer turned over to Richmond and Via for collection (Page 45).

(44) The record does not show what effort, if any, was made by the attorney for Mr. Gilmer in trying to effect collection of the promissory notes executed by the Deckers and endorsed by Gilmer.

(45) In addition to being required to pay the direct obligations of the bankrupts, Mr. Gilmer was also required to pay to said bank promissory notes executed by Albert Mahanes Co., Inc., and Commonwealth Utilities, Inc., which notes had been endorsed by Sterling R. Decker and George Gilmer.

(46) The direct liabilities of the bankrupts on the promissory notes endorsed by Gilmer and held by The Peoples National Bank of Charlottesville as of November 15, 1961, were $247,275.00. Of this amount $16,000.00 the bankrupts borrowed on Mr. Gilmer's endorsement on July 13, 1961, to pay a deferred purchase money bond of the bankrupts and others which was held by Hallum Tuck and Hilda Tuck (Pages 40, 41, 42, 43, 102, and 210).

(47) Payment of one-half of the above referred to Tuck bond had been assumed by David J. Wood, Joseph M. Wood, George Gilmer, Jr., and George Gilmer, Sr., when these parties purchased from Dr. Hurt a ½ undivided interest in the real estate which had

previously been sold by the Tucks to Deckers and Hurt (Pages 41 and 42).

(48) At Page 41 of the record the Landon Birckhead note is described as being a $25,000.00 note, at Page 51 Mr. Gilmer testified that he had received a credit on the Landon Birckhead $25,000.00 note; however, at Page 57 it is shown that the actual amount of credit received "on" this note was $2,500.00. The order of July 3, 1962, is in error wherein it is shown and held that Mr. Gilmer had received a credit of $25,000.00 on the Landon Birckhead note, whereas the actual amount of credit was $2,500.00.

(49) By a deed of trust dated August 10, 1961, and acknowledged by Sterling R. Decker and Mary Jane Decker on August 14, 1961, recorded in the Clerk's Office of Albemarle County on September 6, 1961, in Deed Book 371, at Page 239, there was conveyed to Richard H. Barrick and Downing L. Smith, Trustees, the grantors' ½ interest in 12 lots in Berkeley Sub-Division, in which deed the lot numbers are given, in trust to secure the payment of a demand Bearer bond for $260,000.00 executed by Sterling R. Decker and Mary Jane Decker on March 27, 1961. The record is clear that this deed of trust was given within four months prior to the filing of the petitions in bankruptcy, and the deed of trust shows upon its face that it was given as additional security for an antecedent debt.

(50) By a deed of trust dated October 20, 1961, acknowledged by Sterling R. Decker and Mary Jane Decker on October 31, 1961, recorded in the Clerk's Office of Albemarle County on October 31, 1961, in Deed Book 373, at Page 31, there was conveyed

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to Richard H. Barrick and Downing L. Smith, Trustees, the bankrupts' ½ interest in 9 lots located in Berkeley Sub-Division, in which deed of trust the lot numbers are given, to secure the payment of a demand Bearer bond of $260,000.00 executed by Sterling R. Decker and Mary Jane Decker on March 27, 1961. The record is clear that this deed of trust was likewise given within the four months period as additional security for an antecedent debt.

(51) The bankrupts acquired the ½ undivided interest in the lots described in paragraphs Nos. 49 and 50 above contemporaneous with the giving of the deeds of trust. At the time of acquiring the additional ½ interest in these lots the bankrupts owned the other ½ interest. The ½ interest which the bankrupts acquired on August 10, 1961, was conveyed to them by George Gilmer and others. The ½ interest which the bankrupts acquired on October 20, 1961, was conveyed to them by George Gilmer and others.

(52) A portion, if not all, of the purchase price for the ½ interest in the lots which the bankrupts acquired on August 10, 1961, and October 20, 1961, came from the Reserve Account set forth in No. 23 above. This Reserve Account was made up of money derived from the sale of lots and houses owned by the bankrupts (Pages 16, 20, 86, 105, 106 and 214).

(53) The bankrupts continued in possession of the real estate described in the deed of trust of March 27, 1961, the deed of trust of August 10, 1961, and the deed of trust of October 20, 1961.

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APPLICABLE LAW

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Issue No. 1 raises the question as to whether the dee of trust of March 27, 1961, was given by the bankrupt with intent to hinder, delay or defraud creditors unde Section 70e (1) of the Bankruptcy Act, 11 U.S.C.A. 11 (e) (1), and Section 55-80 of the Code of Virginia. Sec tion 70e (1) of the Bankruptcy Act is as follows:

> "A transfer made or suffered or obligation incurre by a debtor adjudged a bankrupt under this Ac which, under any Federal or State law applicabl thereto, is fraudulent as against or voidable for an other reason by any creditor of the debtor, havin a claim provable under this Act, shall be null an void as against the Trustee of such debtor."

Section 55-80 of the Code of Virginia is as follows:

> "Every gift, conveyance, assignment, or transfer of or charge upon, any estate, real or personal, every suit commenced or decree, judgment or executio suffered or obtained and every bond or other writing given with intent to delay, hinder, or defraud credi tors, purchasers or other persons of or from what they are or may be lawfully entitled to shall, as t such creditors, purchasers, or other persons, and representatives or assigns, be void. This Section shall not affect the title of a purchaser for valuable con sideration, unless it appears that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of said grantor."

In this proceeding the question of fraud under Section 70e (1) of the Bankruptcy Act and Section 55-80 of the Code of Virginia is to be determined under the law of Virginia.

The Virginia Supreme Court of Appeals, in cases too numerous to mention, has held that:

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"The proof in a suit to set aside a fraudulent conveyance must be clear, cogent and convincing, and the burden rests on the party alleging the existence of fraud."

The case of *Bruce vs. Dean* 149 Va. 39, 140 S.E. 377 involved the transfer of real estate in trust for the purpose of defraying the expenses of maintenance, education, and rearing six children of the grantor. Creditors of the grantor instituted suit for the purpose of having the conveyance set aside under what was then Section 5184 of the Code of Virginia—now Section 55-80. The Supreme Court in holding that the conveyance was not fraudulent held:

"Under such circumstances there was no intent to hinder, delay, or defraud creditors, and proof of intent to do one of these things is necessary before a deed can be set aside upon the grounds alleged in these proceedings."

The Virginia Supreme Court of Appeals has many times held that in order to set aside a transfer under Section 55-80 of the Code of Virginia the one attacking the transfer must prove by clear and convincing evidence that the debtor at the time of the transfer had an intent to delay, hinder, or defraud his creditors. If such intent was absent at the time of the transfer, the one attacking the transfer must be able to establish, in order to be successful, by clear and convincing evidence that the transfer was subsequently employed to delay, hinder or defraud creditors.

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Issues No. 2 and 3 raise the question as to whether the deed of trust of March 27, 1961, having been executed and recorded within one year prior to the filing of the petition in bankruptcy is fraudulent under the provisions

of Section 67d of the Bankruptcy Act, 11 U.S.C.A. 107d.

As hereinbefore stated, it is the contention of Mr. Gilmer that said deed of trust of March 27, 1961, and the demand Bearer bond described in and secured thereby was given as collateral security not only for the direct promissory notes of the bankrupts but also the promissory notes endorsed by Gilmer and Decker for Albert Mahanes Co., Inc., and Commonwealth Utilities, Inc.

> "The primary object of a bankruptcy law is to secure a just distribution of the bankrupt's property among his creditors; the secondary object is the release of the bankrupt from the obligation to pay his debts." *Wilson vs. City Bank* 17 Wall 473, 84 L. Ed 723.

Section 67d (1) is the portion of the Section by which terms are defined. Sub-section d (2) is the portion of the Section by which the Trustee is enabled and empowered to set aside, through appropriate proceedings, conveyances which are not within the definitions under Section 67d (1) and fall within the prohibited categories under Section 67d (2).

Section 67d (1) (d) defines the word "insolvent" as to determinations reached under this Section.

Section 67d (1) (e) provides that:

> "Consideration given for the property or obligation of a debtor is 'fair' (1) when, in *good faith*, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in *good faith* to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained." (Underscoring supplied)

Admittedly, the deed of trust of March 27, 1961, was given primarily to secure the payment of antecedent

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debts. Mr. Gilmer contends that the deed of trust was given also to enable the bankrupts to borrow additional funds, but the record shows that the additional funds which the bankrupts borrowed after March 27, 1961, using the $260,000.00 bond as collateral, were infinitesimal as compared to the whole.

In order to determine Issues Nos. 2 and 3 under Section 67d of the Bankruptcy Act we first must determine the meaning of "good faith" as that term is used in this Section. "Good faith" means nothing more than "honesty of purpose". "Honesty of purpose" is not compatible with unjust or inequitable results.

"Good faith" is defined as:

> "An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious." *Warfield Natural Gas Co. vs. Allen*, 248 Ky. 646, 59 S. W. 2d 534, 91 A.L.R. 890.

In the case of Siano vs. Helvering, D. C. N. J., 13 F Supp. 776, 780, the court defined "good faith" as:

> "Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry."

Good faith is indispensable in every transaction under Section 67d of the Act. There must be good faith both on the part of the debtor and on the part of the creditor.

In the case of *Messenger* 32 F Supp 490 the court quoted with approval from *Glenn, Fraudulent Conveyances* (1931) Section 295:

> "The question is solely whether the grantee knew or should have known that he was not trading normally, but that on the contrary, the purpose of the trade,

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so far as the debtor was concerned, was the defrauding of his creditors."

A transfer made or an assignment given without good faith, as the term good faith is used and employed in Section 67d, is made without fair consideration, and if good faith is not present, a fair equivalent has not passed. Matter of *Messenger* 32 F Supp 490; *Shay vs. Gagne* 275 Mass. 386, 176 N.E. 200; *Epstein vs. Goldstein* 107 F 2d 755; *Cohen vs. Sutherland* 257 F. 2d 737.

In order for a transfer to be set aside under Section 67d (2) (a) of the Act, it is necessary that the evidence establish:

(1) The existence of creditors at the time of such transfer;
(2) That the transfer was made without fair consideration; and
(3) That the debtor was either insolvent at the time of the transfer or rendered insolvent thereby.

If the three foregoing enumerated essential conditions are present, there is a conclusive presumption of fraud under this Sub-section, any intent to the contrary notwithstanding. *Epstein vs. Goldstein* 107 F 2d 755.

In this case Mr. Gilmer was not technically a purchaser, but was the beneficiary under a deed of trust given to secure the payment of antecedent debts. A security holder seems to be in a more favored position than is a purchaser. Mr. Gilmer is not the ordinary type of security holder in that he was counsel for the bankrupts and was thoroughly familiar with their affairs.

In the case of *Lumpkin vs. Foley* 204 F 373 the court held:

"A purchaser is not in good faith who makes no effort to determine whether one may make a transfer which will not be in violation of this Section."

"Good faith cannot inhere in a transaction where the transferee knows or has reason to believe that his grantor is insolvent, and that the purpose of the transaction was to defeat this Section." *In Re Pease* 129 F 446.

Under this Section there must be a fair consideration to neutralize the statutory presumption of fraud. The test of fair consideration is not economic but statutory.

The facts in the case of *Mayo vs. Pioneer Bank and Trust Company,* 270 F 2d 823, rehearing denied, 274 F 2d 320, certiorari denied 80 Sup. Ct. 878, are not the same as the facts in the Decker case, but the court's construction of 67d (1) (e) of the Act is applicable to the Decker case. At Page 830 the court held:

"The requirement of 'fair consideration' is aimed at preventing a bankrupt depleting his estate just preceding his bankruptcy either by improvidence or by action intended to defeat creditors or favor friends."

Section 67d (2) of the Bankruptcy Act is taken from Section 5 of The Uniform Fraudulent Conveyance Act. The Uniform Fraudulent Conveyance Act has not been adopted in Virginia. Under this Section of the Act:

"Transfers made to benefit third parties are clearly not made for a 'fair consideration'." *Davis vs. Hudson Trust Company* 28 F 2d 740, certiorari denied 278 U.S. 655, 49, Sup. Ct. 179.

In the case of *Hays vs. Darden,* Tenth Circuit, 284 F 2d 932, Tri-State Corporation, on June 25, 1956, obtained from Hays a loan in the amount of $6,000.00. The purpose of the loan was to enable Tri-State to pay certain indebtedness so that Tri-State could move its equipment from New Mexico to Dell County, Texas, where Tri-State was to do certain work on ditches for Hays. Hays took as security for the loan an assignment of sub-

stantially all of the equipment of Tri-State. On September 7, 1956, for an additional loan of $3,135.25, Hays received a second assignment from Tri-State for substantially all of its equipment. Both of the loans were evidenced by promissory notes executed by Tri-State. On October 22, 1956, Tri-State executed and delivered to Hays a Bill of Sale covering practically all of its equipment.

The court held that the transfer to Hays rendered Tri-State insolvent; that the transfer was made within one year prior to the initiation of the bankruptcy proceeding, and that the transfer to Hays was fraudulent and void under Section 67d (2) of the Bankruptcy Act, 11 U.S.C.A. 107d (2).

At the time of the giving of the deed of trust of March 27, 1961, the Deckers were indebted to many creditors who held no security. If this deed of trust is set aside, the benefits will inure to all unsecured creditors whose claims are allowed in the bankruptcy proceeding. *Moore vs. Bay* 284 U.S. 4.

The case of *Dean vs. Davis, Trustee, etc.*, 242 U.S. 438 arose in Virginia prior to 1938. In 1938 what are now Sections 60, 67 and 70 of the Act were completely revised along with a general revision of the Act. The provisions of Section 67e and 67d of the old Act—the Act which was in effect at the time of the decision in the *Dean vs. Davis* case—were entirely recast in the 1938 Act. Old Sub-division e divided transfers into two kinds: (1) transfers made with intent to hinder, delay or defraud creditors, and (2) transfers which are null and void as against creditors by the law of the state in which the property is situated. Old Sub-division e of Section 67 was essentially the same as the present 67d (2) (d).

In the case of *Dean vs. Davis* the court held that the

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lender had made the loan to enable the debtor to make a preferential payment with bankruptcy in contemplation and the lender knowing these facts was not a purchaser in good faith. The deed of trust was held to have been given with intent to hinder, delay and defraud creditors.

Sub-section d (2) (a) of Section 67, defining fraudulent transfers establishes a test for fraud which is independent of common law concept of fraud in fact, and if element of fair consideration is absent, transfer is conclusively presumed to be fraudulent regardless of actual intent of transferor.

Even if the deed of trust of March 27, 1961, is held to be valid under Section 67d of the Bankruptcy Act as to the primary notes executed by the bankrupts, endorsed by Gilmer and held by the bank, the promissory notes of Albert Mahanes Co., Inc., and Commonwealth Utilities, Inc., which Mr. Gilmer has tried to place under this deed of trust and the demand Bearer bond certainly cannot be considered as a part of the debt for which the $260,000.00 demand Bearer bond was held as collateral. The bankrupts were under no obligation to transfer their property in trust for any part of the debts of Albert Mahanes Co., Inc., and Commonwealth Utilities, Inc. *Hines Western Pine Company vs. First National Bank of Chicago* 61 F 2d 503; *Midland Supply Company, Inc., vs. American Distilling Company, Inc.*, (C.A. 10, March, 1962)

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Issue No. 4. Mr. Gilmer contends that the deed of trust of March 27, 1961, constitutes a lien on the real estate therein described and conveyed not only for the specific debt therein described and conveyed, but also for attorney's fees. The demand Bearer bond of $260,000.00, which was used as collateral for various promissory notes,

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contains no provision for the payment of attorney's fees, nor does the deed of trust in describing the indebtedness secured thereby contain any language to put anyone on notice that the deed of trust secured the payment of not only the maximum principal of $260,000.00 and interest but also attorney's fees.

It is well established in Virginia that a deed of trust creates a lien to secure a debt. It is likewise well established that in order for the holder of a bond or promissory note to collect attorney's fees from the maker who fails to pay the indebtedness within the specific time the instrument itself, being the contract between the parties, must impose that obligation upon the maker. An agreement in a bond or promissory note for the payment of attorney's fees is a contract of indemnity, and if there is no contract for such indemnity, the maker is not permitted to collect.

By Section 55-59, Sub-section (2) of the Code of Virginia, the grantor in a deed of trust to secure an indebtedness shall be deemed to covenant to pay the fees or charges of such agents or attorneys as the Trustee may deem advisable to employ for the purpose of the trust. By this Section the maker of a deed of trust is merely bound to pay fees and charges of agents and attorneys employed by the Trustee in enforcing the trust. This Section does not impose on the maker of a note or bond an obligation to pay the fees of an attorney employed by the holder in an effort to enforce collection under the bond or note.

Upon signing the $260,000.00 demand Bearer bond the makers thereof did not agree to pay attorney's fees for the collection of the bond.

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Issue No. 5 and *Issue (b)* pose the question as to

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hether Mr. Gilmer is entitled to charge and receive from he bankrupts a fee for endorsing the promissory notes f the bankrupts, and as to whether the burden was on he Trustee or Mr. Gilmer to prove that there was a ontract between the bankrupts and Gilmer as to the harges to be made by Gilmer for endorsing the bankupts' promissory notes.

Mr. Gilmer had for several years been endorsing the romissory notes of the bankrupts for a fee of 6% of the ace amount of the notes, which endorsement fee was, fter March 27, 1961, reduced to 3%.

No written contract between the parties as to the harge which Gilmer was to make for endorsing the romissory notes of the bankrupts was introduced, and o verbal contract between the parties as to these charges as been established.

The Referee had heard of endorsement charges being ade in some of the large metropolitan aras of the naon, but until this matter arose he did not realize that here was anyone in this section of the State of Virginia ho was so desperate for security that payment would e made to one for selling his credit. Just how this matr initially arose, the evidence does not show. Mr. Gilher's evidence does not show whether he initially merely greed to sell his credit to the bankrupts for a certain e, or whether he agreed to obtain loans, with his enorsement, for the bankrupts for a certain fee.

The case of *Chakales vs. Djiovanides* 170 S.E. 848; 1 Va. 48 has been cited by Mr. Gilmer in support of s contention that he was entitled to charge and receive om the bankrupts a separate fee for endorsing the romissory notes of the bankrupts. The Chakales case volved many issues. The Chakales were heavily inbted, and through an agent agreed to pay Djiovanides

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brokerage of $1,000.00 for obtaining a loan for them. When the loan was obtained, Djiovanides, commonly called Costt John, withheld from the loan proceeds the brokerage charge of $1,000.00, and an additional brokerage charge of $750.00. The court concluded, Page 861, that Chakales had, through their agent, agreed to pay the brokerage charge of $1,000.00.

The court in the Chakales case, Headnote 22, Page 862, stated:

> "It is well settled that a borrower may employ an agent or broker to procure a loan for him from some third person, and, in the absence of any statutory restriction, pay him any compensation for any service that may be agreed upon between them without rendering the loan made by the third person usurious, provided the lender has no interest whatsoever in such payment, and the agent or broker no interest in the loan made by the third person."

There is no evidence in this proceeding as to a written or verbal agreement between Deckers and Gilmer for the purchase and sale of Gilmer's credit. Decker's testimony that Gilmer's recitation that the endorsement charges (Findings of Facts No. 29) is in conformity with Decker's recollection, of the matter does not establish a contract. There is no intimation that the bank had any interest whatsoever in the payment of the endorsement charges made by Deckers to Gilmer. The evidence does show that Gilmer, as an endorser, had an interest in the loan made by the bank to Deckers.

In the Chakales case, Page 862, under Headnote 24, the court stated:

> "It is also well settled that in determining whether a particular contract was a contract for the loan of money for a usurious consideration, or a legitimate brokerage contract or a legitimate contract for the

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sale of credit, the courts will disregard its form and look to its substance."

Contracts for the sale of credit must be viewed with a "jealous eye". As was stated by the court in the Chakales case, Page 862, Headnote 21:

> "To escape the charge of usury it must be established by clear, cogent, and convincing evidence, which removes any serious doubt on the point, that the charge was made in good faith for such service and did not, either in whole or in part, constitute a consideration to the lender for making to the borrower a loan of money."

To state the point differently, the burden was on Mr. Gilmer to establish by clear, cogent and convincing evidence that there was a definite and fixed contract or agreement between him and Deckers as to what charges, if any, would be made by Gilmer for selling his credit to the Deckers.

In the case of *Richeson vs. Wood*, 163 S.E. 66, 158 Va. 269, the original borrower's note was used as collateral for a bank loan, the court held that the extraction of a brokerage fee, in addition to the legal rate of interest, rendered the transaction usurious.

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Issue No. 6 presents for determination the amount due Gilmer under the deed of trust of March 27, 1961, if the deed of trust is held not to be void.

Issue No. 7 presents for determination the question as to whether Gilmer is entitled to hold as additional security the Hallum Tuck and Hilda Tuck bond.

The evidence is clear that on November 15, 1961, Gilmer as endorser of Deckers' promissory notes was required by the bank as the owner and holder of the notes

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to pay the amount then due thereon. The amount paid by Gilmer to the bank in settlement of the Deckers' promissory notes was $247,275.00. This amount included $16,000.00 which was borrowed by Deckers from the bank, with Gilmer's endorsement, on June 13, 1961. This item of $16,000.00 was borrowed for the purpose of taking up the Hallum Tuck and Hilda Tuck secured bond. One-half of the indebtedness owed the Tucks had been assumed by David J. Wood, Joseph M. Wood, George Gilmer, Jr., and George Gilmer, Sr., when they purchased from Dr. Charles Hurt a ½ undivided interest in certain real estate—real estate in which Deckers owned the other ½ undivided interest.

At Page 42 of the transcript Mr. Gilmer testified that only one-half of this indebtedness of $16,000.00 was actually owed by Deckers.

We have been cited to no specific authority, nor have we been able to find any, in support of Mr. Gilmer's contention that he was entitled to hold as additional security the Tuck bond. There is no evidence to support the contention of Mr. Gilmer that there was any agreement or understanding between him and Deckers that Deckers would borrow $16,000.00 to pay the Tucks and then would permit Mr. Gilmer to hold the Tuck bond as additional security. Since the payment of one-half of this bond had been assumed by others, Deckers should not have been required by Mr. Gilmer or anyone else to borrow funds to pay a debt for which others were obligated.

In the event the deed of trust of March 27, 1961, is held to be a valid and subsisting lien against the real estate therein described and conveyed—the description of the real estate is extremely sketchy, but we do not feel that it is necessary at this time to deal with this phase of

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the deed of trust—the amount due thereunder is as follows:

Principal	$247,275.00	
Minus	8,000.00	
Balance		$239,275.00
Interest on $239,275.00 from November 15, 1961, to date of payment		
LESS:		
Interest on $8,000.00 from June 13, 1961, to November 15, 1961		
All endorsement charges made by Gilmer for endorsing the bankrupts notes		
All endorsement charges collected by Gilmer from the bankrupts for endorsing the notes of Albert Mahanes Co., Inc.		
All endorsement charges collected by Gilmer from the bankrupts for endorsing the notes of Commonwealth Utilities, Inc.		
Amount collected by Gilmer from sale of Jefferson Park Common	8,890.00	
Amount collected by Gilmer from Landon Birckhead	2,500.00	
Any and all other payments which Gilmer may		

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have received, which have not been disclosed by the evidence, from the sale of security or otherwise, but not including insurance premiums and regular attorney's fees and costs advanced.

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The additional issue raised by the Trustee, labeled "(a)" herein, has been dealt with and covered under Subparagraph E above.

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Issue No. 8 poses the question as to whether Mr. Gilmer is entitled to attorney's fees on the promissory notes endorsed by him, which notes he as endorser has been required to pay to the bank as the owner and holder.

Issue (c) raised by Mr. Gilmer on his petition for review is the same issue, in essence, as Issue No. 8, except as to the burden of proof.

The promissory notes made by the Deckers provide for the payment of attorney's fees of 15% if collected by an attorney after default. The amount provided in a promissory note for attorney's fees, being a contract of indemnity, is a limit upon the amount of the charge, not its measure.

In this proceeding, all the evidence shows is that prior to bankruptcy Mr. Gilmer placed in the hands of his attorney photostatic copies of the Deckers' promissory notes. The record is utterly silent as to what effort, if any, had been made by the attorney to effect collection. On the record as it now stands, Mr. Gilmer's claim to be reimbursed for attorney's fees is not a debt which

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may be proved or allowed under Section 63 of the Bankruptcy Act, 11 U.S.C.A. 103.

> "In many instances the obligation by which a bankrupt's indebtedness is evidenced contains a stipulation for an attorney's fee for the collection thereof and in such case, if the claim has been placed with an attorney prior to bankruptcy, and collection proceedings were actually instituted, so that the attorney's fee was a fixed liability at the time of the filing of the petition in bankruptcy, such fee will constitute a provable debt against the estate of the debtor." *Merchants Bank vs. Thomas,* 121 F 306; *In Re Torchia,* 185 F 576.

The fee to which Mr. Gilmer's attorney may be entitled in representing Mr. Gilmer in filing the involuntary petition in bankruptcy is not in anyway related to the present claim for the allowance of attorney's fees on the notes signed by Deckers.

The burden was on Mr. Gilmer to establish that he is entitled to be indemnified for attorney's fees paid or incurred in endeavoring to collect the amounts due on the promissory notes executed by the bankrupts. *In Re Castle Braid Company,* 145 F 224.

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Issues Nos. 9 and 10 raise the question as to the efficacy of deeds of trust executed and recorded within four months prior to bankruptcy as additional security for an antecedent debt.

The deed of trust executed on August 10, 1961, and the deed of trust executed on October 31, 1961, both show that they were given as security for the payment of the demand Bearer bond of March 27, 1961. At the time of the giving of each of these deeds of trust there was conveyed to Deckers by George Gilmer and others a ½ un-

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divided interest in certain lots. Payment for the lots so purchased was made from the Reserve Account over which George Gilmer has control. Some of the purchase price for the lots so purchased may also have been paid from the Escrow Account which was in the name of George Gilmer and over which George Gilmer had absolute dominion.

Section 60 of the Bankruptcy Act 11 U.S.C.A. 96, Sub-section a (1) is as follows:

> "A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class."

Sub-section b of Section 60 of the Act provides that any preference may be avoided by the Trustee if the creditor at the time when the transfer was made had reasonable cause to believe that the debtor was insolvent.

All six of the essential elements are present in this proceeding to constitute both of said deeds of trust as preferences. The further additional element of reasonable cause to believe that the debtor was insolvent at the time of the transfer is present. Mr. Gilmer knew, or should have known, the financial condition of the Deckers. The case of *Aulick vs. Largent,* 295 F 2d 53, which arose in the Western District of Virginia, involved the transfer of stock by a bankrupt within four months prior to bankruptcy as security for the contemporaneous endorsement by the transferee of the bankrupts promissory note payable to the transferee, which was by the transferee endorsed over to a creditor of the bankrupt in satis-

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faction of her debt. The court held that this was a voidable preferential transfer of assets.

Mr. Gilmer's position is that the funds which were used to pay to Gilmer and others the purchase price for the conveyances of a ½ undivided interest in the lots in question were derived from the sale of lots covered by the deed of trust of March 27, 1961. Upon the sale of the lots and their release from the purported lien of March 27, 1961, the funds derived from the sale became a part of the "free assets" of the bankrupts. Upon the sale of the lots Mr. Gilmer had absolute control and dominion over the sale price, and the funds derived from the sale were employed by him to purchase from himself and others a ½ undivided interest in lots which were conveyed to Deckers.

Issue (a) raised by Mr. Gilmer on the petition for review poses an inquiry as to whether the order of July 3, 1962, went beyond the pleadings and evidence.

A hearing in a bankruptcy proceeding involves an investigation into disputed occurrences amid uncertain conditions. Those whose financial position becomes so involved, entangled and onerous that they must resort to bankruptcy proceedings, or be forced into bankruptcy, for the excision of their debts, are not particularly noted for the completeness of their records, nor the clarity of their recollection. When the dream of pyramiding a small amount of capital into a house of gold begins to be abraded by the accumulation of debts, even those who are helped, guided and counseled by extremely capable and assiduously resourceful attorneys do not seem to be able to keep debts and resources in proper perspective. In this Deckers do not seem to be an exception.

It is respectfully submitted that the order of July 3,

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1962, dealt only with the issues raised by the notice and established by evidence without objection.

CONCLUSIONS OF LAW
SUMMARY JURISDICTION

On this petition for review the first question that may arise is as to the summary jurisdiction of the Referee to hear and to determine the matters involved.

In 1952 Section 2a (7) of the Bankruptcy Act, 11 U.S.C.A. 11 (7), was amended by adding the following clause:

> * * *"and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the Court of Bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed therefore consented to such jurisdiction."

The foregoing quoted amendment was adopted to overcome the effect of the decision in the case of *Cline vs. Kaplin*, 323 U.S. 97.

In the Decker proceeding the real estate described in the various deeds of trust remained in the possession and under the control of the bankrupts, and upon the adjudication of bankruptcy, title to the real estate vested in the Trustee under the provisions of Section 70 of the Bankruptcy Act, 11 U.S.C.A. 110, subject only to the valid liens binding the same.

The case of *Lindsey Robinson & Co., Inc., vs. Robert C. Grady, Trustee*, 282 F 2d 607, involved the question of summary jurisdiction of the Referee to determine the ownership of certain poultry. The Fourth Circuit Court of Appeals held that as of the date of the filing of the

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petition in bankruptcy the bankrupt had constructive possession of the poultry and that the Referee was, therefore, empowered to adjudicate ownership in the exercise of summary jurisdiction. *Taubel-Scott-Kitzmiller Company, Inc., vs. Fox,* 264 U.S. 426.

It has long been held that liens can be determined in a summary proceeding. *Investor's Syndicate vs. Smith,* 105 F 2d 611.

> "A court of bankruptcy which, by its Trustee, has possession of the property of a bankrupt, has jurisdiction to determine all questions with respect to title or liens thereon, and may entertain a suit or petition by the Trustee against a mortgagee of the property to set aside the mortgage as one given within four months prior to the bankruptcy and void under the Act." *In Re McMahon* 147 F 684.

In the case of *George A. Jackson vs. Sport Company of Texas,* 278 F 2d 716 (Fifth Circuit), the debtor within one year prior to bankruptcy transferred title to real estate to one of the officers of the corporation, but the corporation continued to occupy the real estate until it was adjudged a bankrupt. The court held that the Referee had summary jurisdiction to determine whether the transfer was voidable under Section 67 of the Act.

-A-

That the deed of trust of March 27, 1961, was not given with intent to hinder, delay or defraud creditors in contravention of the provisions of Section 70e of the Bankruptcy Act, 55-80 of the Code of Virginia, or Section 67d (2) (d) of the Bankruptcy Act.

-B-

The Referee has concluded that he definitely was in error in holding in the order of July 3, 1962, that the

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deed of trust of March 27, 1961, is not voidable under the provisions of Section 67d of the Bankruptcy Act.

Upon a more careful study of the briefs filed by the Trustee and by Mr. Gilmer the Referee is of the opinion that the deed of trust of March 27, 1961, is a voidable transfer of assets under Section 67d (1) and (2) of the Bankruptcy Act not only as to the debts of Albert Mahanes Co., Inc., and Commonwealth Utilities, Inc., but also as to the antecedent debts of Deckers as having been given and received without good faith and without fair consideration as security for antecedent debts.

-C-

That the demand Bearer bond of March 27, 1961, contains no provision for the payment of attorney's fees, nor does the deed of trust of March 27, 1961, purport to secure the payment of attorney's fees. The deed of trust, if determined to be valid, does not secure the payment of claimed attorney's fees.

-D-

That Mr. Gilmer has not carried the burden of proof required of him to show that he was not directly or indirectly the initial lender of the funds to Deckers, or that there was a definite and fixed contract between Deckers and Gilmer for a charge to be made by Gilmer for lending his credit.

-E-

That if the deed of trust of March 27, 1961, is held to be valid, the amount due Mr. Gilmer thereunder is $239,275.00, with interest thereon from November 15, 1961, less credits to both principal and interest. The exact amount due Mr. Gilmer cannot be determined without the taking of further evidence on the various disputed items of possible credits.

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That Mr. Gilmer is not entitled to hold as additional security, if he has security, the Tuck bond of $16,000.00.

-F-

The Trustee raised in his petition for review an issue as to whether Gilmer is entitled to interest on the remaining principal balance due under the bond of March 27, 1961, if it is held that the bond is a secured debt. The authorities are well established that a security holder is entitled to receive interest on his debt, especially if the security is liquidated for an amount sufficient to pay principal, interest and costs. Of course, the only principal on which Mr. Gilmer is entitled to interest is the principal remaining due under the Decker notes for which the demand Bearer bond was held as collateral.

-G-

That Mr. Gilmer, not having established what work was done by his attorneys prior to bankruptcy in an effort to effect collection of the various Decker promissory notes, and not having established the reasonableness of the charges claimed, he is not entitled to be indemnified for attorney's fees.

-H-

That the deed of trust executed August 10, 1961, and the deed of trust executed October 31, 1961, were both preferential transfers as security for antecedent debts, and are void under both Section 60 and Section 67 of the Bankruptcy Act.

RECORD CERTIFIED

In connection with the petitions for review I do hereby certify the following:

(1) Order entered on April 16, 1962.

(2) Notice of Hearing filed by the Trustee on April 20, 1962.

(3) Answer of Mr. Gilmer filed April 24, 1962, to Trustee's notice.

(4) Transcript of evidence consisting of 265 pages taken on April 24, 1962, and May 9, 1962.

(5) Gilmer's Exhibit No. 1, being a photostatic copy of a deed dated June 14, 1961, from Deckers to Fitch, Pages 17 and 35 of record.

(6) Gilmer's Exhibit No. 2, as to valuation of Decker's real estate as of approximately November, 1960, Page 26 of record.

(7) Letter dated February 26, 1962, from Gilmer to Woodson, Page 53 of record.

(8) Photostatic copies of four promissory notes executed by Deckers, and endorsed by Gilmer, Pages 7, 91, and 110 of record.

(9) Photostatic copies of four promissory notes executed by Albert Mahanes Co., Inc., and endorsed by Gilmer and Sterling R. Decker, Pages 7, 91, and 110 of record.

(10) Photostatic copy of bond of $260,000.00 dated March 27, 1961, showing both the front and back, Pages 7 and 110 of record.

(11) Photostatic copy of deed of trust of March 27, 1961, from Deckers to the Trustees therein named to secure the payment of the demand Bearer bond of March 27, 1961, Pages 7 and 110 of record.

(12) Photostatic copy of financial statement, dated August 31, 1960, from Sterling R. Decker, with photostatic copies of explanatory statements thereto attached, Page 110 of record.

(13) Original deed of trust dated August 10, 1961, executed August 14, 1961, from Deckers to Trustees

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therein named to secure payment of demand Bearer bond of March 27, 1961, Page 161 of record.

(14) Original of deed of trust dated October 20, 1961, executed by Deckers on October 31, 1961, from Deckers to Trustees therein named to secure payment of demand Bearer bond of $260,000.00, Page 161 of record.

(15) Photostatic copy of a letter dated June 5, 1961, from Decker to Internal Revenue Service, Page 166 of record.

(16) Copy of statement by Mr. Gilmer of receipts and disbursements from Reserve Account, Page 203 of record.

(17) Statement filed by Mr. Gilmer as to real estate sold by Deckers subsequent to recordation of deed of trust of March 27, 1961, Page 208 of record.

(18) Memorandum of Law and Argument filed by Trustee on June 9, 1962.

(19) Memorandum of Law and Argument filed by Mr. Gilmer on June 16, 1962.

(20) Additional Memorandum filed by Trustee on June 30, 1962.

(21) Additional Memorandum filed by Mr. Gilmer on July 3, 1962.

(22) Order entered on July 3, 1962.

(23) Petition for review filed by Mr. Gilmer on July 11, 1962.

(24) Petition for review filed by Trustee on July 13, 1962.

(25) Answer to Trustee's petition for review filed by Mr. Gilmer on July 18, 1962.

Respectfully submitted this 8th day of October, 1962.

JULIAN K. HICKMAN
Referee in Bankruptcy

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APPENDIX L

PROCEDURAL ASPECTS STATEMENT

Due to the complex procedural posture of this litigation, the discussion of the substantive questions below might be more readily followed if it is preceded by an explanation of the procedural aspects of the matter as understood by the trustee.

Originally, there were two separate bankruptcy proceedings—one involved Sterling Decker personally and the other was the construction partnership of Decker and his wife—each of which had its separate trustee. After nearly three months of proceedings, a conflict of interest became apparent between the bankrupt estate and The Peoples National Bank of Charlottesville (now Virginia National Bank), and the trustee for the partnership, whose firm was counsel for the Bank, decided that he should resign. B. B. Woodson, who originally had been only the trustee for the individual bankruptcy, was then named as substitute trustee in the partnership proceedings as well. Shortly thereafter, the two proceedings were consolidated for almost all purposes.

A short while after the first meeting of creditors, the original partnership trustee filed his petition with the Referee to set aside a Deed of Trust which had been executed by the bankrupts on March 27, 1961, to secure The Peoples National Bank and George Gilmer (as endorser) for the indebtedness which the bankrupts owed to the bank.

George Gilmer later undertook primary liability to the bank for this indebtedness, as a consequence of his endorsements, at a time prior to the filing by him of the involuntary petitions in bankruptcy.

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This Deed of Trust, which secured a collateral bond in the face amount of $260,000 is hereafter referred to as the "Blanket Deed of Trust" and is the focal point of most of the ensuing litigation. It is so named because it purports to convey all real estate of every nature (including beneficial interests in real estate where someone else was the owner of record) owned by Decker on that date. Certain other property thereafter acquired by Decker was also brought under its lien as additional security by four subsequent deeds of trust, herein referred to as Supplemental Deeds of Trust.

In his original order of July 3, 1962, entered after the hearing held on the trustee's petition, the Referee held (along with other holdings not here pertinent) that the Blanket Deed of Trust was valid as security for the debts of Decker and his construction partnership (Berkeley Community Builders), but was void insofar as it purported to secure debts of other related businesses, even though the notes of these other businesses had also been endorsed by Decker. The same order set aside as preferential the last two of the Supplemental Deeds of Trust (those recorded on September 5, 1961, and October 31, 1961), which were the only ones within the four-month preferential period. This order did not rule on the validity of the first two Supplemental Deeds of Trust, i.e., those recorded on June 7 and August 4, 1961.

Both the creditor (George Gilmer) and the trustee petitioned for review of this order. Accordingly, the Referee prepared findings of fact and conclusions of law as a preliminary to certifying the record to the District Court. During this process, the Referee decided that his order was incorrect and that the Blanket Deed of Trust was invalid for all purposes. Accordingly, while he certified the order as entered, he accompanied this with a

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specific statement of his changed position. For reasons which are not apparent, he merely stated this changed opinion without changing his order or findings to conform to it.

Upon certification of the record, the trustee filed a formal motion to remand the record to the Referee to clear up inconsistencies and to secure rulings on issues not yet ruled on, which the trustee believed should be ruled on in order that a full picture might be before the Court. This motion was denied by Judge Thomas J. Michie, who later disqualified himself from hearing the petitions for review on their merits since he had been a director of The Peoples National Bank during the period in question, prior to his appointment to the bench.

The petition for review was argued before the District Court (Judge A. D. Barksdale), as a result of which Judge Barksdale's order of May 25, 1963, not only upheld the Referee's changed position, but went further and held that the Blanket Deed of Trust was invalid for additional reasons beyond those given by the Referee in the statement of his changed position.

This decision was appealed by Gilmer. By its order entered May 25, 1964, the United States Court of Appeals for the Fourth Circuit (opinion by Judge Boreman) reversed the District Court, holding that the Referee was bound by his own findings of fact and that, since he had not changed the findings on which his original conclusion rested, his original order must stand. However, the Court did not enter judgment, but remanded the case for further proceedings. After extensive argument in the District Court on the significance and scope of the remand, the District Court remanded this case to the Referee in identical terms.

While these proceedings were in progress, other liti-

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gation was being conducted in the state courts. On September 11, 1964, the Supreme Court of Appeals of Virginia decided a suit before it, the subject-matter of which concerned the nature of the arrangement between Decker and the four co-owners of the undeveloped portion of the Berkeley subdivision land. *Woodson* v. *Gilmer,* 205 Va. 487, 137 S.E.2d 891 (1964). The Court held that no other conclusion is possible than that the arrangement constituted a partnership, and accordingly reversed a contrary holding of the trial court. This decision is significant because it had a substantial effect on the present litigation in that it determined that the bankrupt's interest in a large tract of land was an interest in a partnership and not simply a tenancy in common.

Very shortly thereafter, on September 24 and 25, 1964, the Referee held extensive hearings pursuant to the remand and took 444 pages of additional testimony. Unfortunately, before he had any opportunity to enter an order in consequence of these further proceedings, he took ill and died.

To compound the problem, within six months thereafter the two principal attorneys in the litigation, both the attorney for the trustee and the principal attorney for the creditor, died by suicide. The ensuing delays are rather understandable since a new Referee, who had personally heard no part of the testimony, had to familiarize himself with an enormous record; and a new attorney had to take over the trustee's representation.

Following these developments, the issues were argued at length before the Referee, and he was requested to make new findings of fact in connection with whatever decision he reached. In spite of the fact that the legal climate had meanwhile changed (as a result of the decision of the Virginia Supreme Court of Appeals referred

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to above) and that a number of issues were now up for decision on which no decision had previously been made, the Referee declined to make new findings (or even to act on the proposed findings submitted to him by counsel) and entered his order of September 11, 1968, holding in substance that the prior decision of the Fourth Circuit required him to find the Blanket Deed of Trust valid, since the original finding of fact had not been changed. He further ruled (for the first time) that the Blanket Deed of Trust was an effective conveyance of Decker's interest in the land-owning partnership.

In a separate order entered on August 23, 1968, the Referee, also for the first time, ruled on the validity of the first two Supplemental Deeds of Trust (those executed prior to the preferential period). As to these conveyances, the Referee considered the evidence and concluded that both were void under Section 67d(2) (a), (b), (c), and (d) of the Bankruptcy Act.

Petitions for review were filed from both of these orders and the proceedings on review were consolidated, since so much of the record pertained to both orders. Briefs were filed, and an opportunity for oral argument before the Court (Judge Ted Dalton) was requested but denied. On January 6, 1969, the Court affirmed the holding of the Referee that the Blanket Deed of Trust was valid, but reversed the holding that the Supplemental Deeds of Trust were void. This decision was affirmed by the United States Court of Appeals for the Fourth Circuit in a brief *per curiam* opinion.